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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ....

UTAH PUBLIC SERVICE COMMISSION, *Appellant*

v.

EL PASO NATURAL GAS COMPANY, ET AL, *Appellees*

On Appeal from the United States District Court for the District of Utah

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JURISDICTIONAL STATEMENT

The Utah Public Service Commission, Appellant and Intervenor in *United States* v. *El Paso Natural Gas Co., et al.*, designated civil action number C-143-57 in the United States District Court for the District of Utah, appeals from the final judgment of the district court selecting Colorado Interstate Gas Company (CIG) as the successful applicant for the acquisition of the New Company created by divestiture pursuant to the mandates of this Court in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964), and *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967). The selection of CIG perpetuates

rather than eliminates the economic concentration in the highly concentrated natural gas transmission industry condemned by this Court in *El Paso* and independently violates Section 7 of the Clayton Act.

OPINION BELOW

The tentative Opinion, Findings of Fact and Conclusions of Law of the district court dated June 21, 1968, are not fully reported. They are partially reported in 1968 CCH Trade Cases, ¶ 72,533 (D Utah, 1968.) The Final Judgment, Opinion and Amended Findings of Fact and Conclusions of Law of the district court dated August 29, 1968, are not reported, nor is the Order of the court dated November 7, 1968, granting El Paso Natural Gas Company's motion to amend Findings of Fact and to amend Judgment. Copies of these documents are set forth consecutively in the Appendix at pages 37-141.

JURISDICTION

This action is a civil suit brought by the United States under Section 7 of the Clayton Act, 28 Stat. 731, as amended, 15 U.S.C. 18. The proceedings below in this case involve the divestiture required by the mandates of this Court in *El Paso* and *Cascade* to remedy the illegal acquisition of Pacific Northwest Pipeline Corporation by El Paso Natural Gas Company. The Tentative Opinion, Findings of Fact and Conclusions of Law of the District Court were entered June 21, 1968 and the Final Judgment, Findings of Fact and Conclusions of Law were entered on August 29, 1968 and docketed on September 3, 1968. On September 6, 1968, El Paso filed a Motion to Amend Findings of Fact and to Amend Judgment. El Paso's motion only

requested that the Final Judgment of the court of August 29, 1968, be amended in two respects, that is to exclude two non-utility investments, Phillips Pacific Chemical Company and Pacific Northwest Realty Company, from the assets to be divested by El Paso to CIG. The court's Tentative Opinion of June 21, 1968, had provided for the divestment of these assets but the Implementing Documents filed by El Paso and CIG prior to the August 23 hearing on the objections to the court's Tentative Opinion and the court's August 29 Final Judgment did not provide that such assets were to be acquired by CIG. At the August 23 hearing CIG noted that there was no objection to the exclusion of such assets. (Tr.-10,009.) The court, in any event, heard El Paso's Motion to Amend on November 7, 1968. The court expressly noted at that hearing that the court's "failure to provide for the retention by El Paso of those two investments of Pacific Chemical and the Pacific Northwest Realty was merely an *oversight.*" (Tr.-11,055.) (Emphasis Supplied.) On November 7, 1968 the court entered an order granting El Paso's Motion to Amend Findings and to Amend Judgment. The court's Order was docketed on the same date. The court's Order provided in part:

> IT IS FURTHER ORDERED that except as amended hereby, the Findings of Fact, Conclusions of Law and Opinion of the Court entered by the Court's Order of August 29, 1968, shall remain in full force and effect and this Order as amended hereby is declared to be a final judgment from which appeal may be taken.

The Appellant doubts that El Paso's Motion to Amend sought reconsideration of "basic findings of fact." *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 177 (1944). The Appellant, Utah Public Service Commission, filed a

Notice of Appeal in the United States District Court for the District of Utah on September 18, 1968, and filed a second Notice of Appeal in the same court on November 13, 1968, in order to obviate any question as to the finality of the judgment from which this appeal was taken. The jurisdiction of this Court to review the Final Judgment of the district court on direct appeal is conferred by Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 29; *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co., supra; Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); *United States* v. *E. I. du Pont de Nemours*, 366 U.S. 316 (1961).

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in relevant part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jursidiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

QUESTIONS PRESENTED

Whether CIG's acquisition of New Company, on the undisputed facts, foreclosed potential competition in the sale of natural gas in the California market in violation of Section 7 of the Clayton Act?

Whether CIG's acquisition of New Company, on the undisputed facts, eliminated competition for the acquisition of gas reserves in Wyoming in violation of Section 7 of the Clayton Act?

Whether CIG's acquisition of New Company was, on the undisputed facts, an acquisition, the effect of which "may be substantially to lessen competition" in the sale of natural gas in Utah and Western Colorado in violation of Section 7 of the Clayton Act?

Whether CIG's acquisition of New Company, extending CIG's market monopoly from Eastern Colorado to the Pacific Northwest and enhancing its monopoly power, violated Section 7 of the Clayton Act?

Whether Section 7 of the Clayton Act and the mandates of this Court sanction the selection of CIG as the successful applicant for New Company when such selection leaves a substantial likelihood that the tendency toward monopoly previously condemned by this Court has has not been eliminated and alternative means of divestiture remain?

STATEMENT OF THE CASE

Once more, nearly five years after this Court first spoke, after 11 years of litigation, three appeals to this Court and two mandates of this Court requiring divestiture without delay, a district court with the ambivalent participation of the Justice Department has once again nullified the effective enforcement of Section 7 of the Clayton Act.

HISTORY OF THE CASE

This civil antitrust action was commenced on July 22, 1957, by the United States, alleging that El Paso Natural Gas Company's (El Paso) acquisition of Pacific Northwest Pipeline Corporation (Pacific Northwest) violated Section 7 of the Clayton Act. This litigation has been before this Court on three occasions. This Court in *California* v. *Federal Power Cimmission,* 359 U.S. 482 (1962) held that the Federal Power Commission should stay administrative action on the El Paso-Pacific Northwest merger pending the determination of whether the merger violated Section 7. After trial this Court in *United States* v. *El Paso Natural Gas Co., supra,* reversed the judgment of the district court and held that the acquisition of Pacific Northwest by El Paso violated Section 7 of the Clayton Act. This Court in *El Paso* ordered divestiture without delay. Finally, nearly three years later, this Court in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co., supra,* held that the appellants on that appeal were entitled to intervene as of right under Rule 24 of the Federal Rules of Civil Procedure and that the divestiture decree agreed upon by the Department of Justice and El Paso failed to comply with the mandate of this Court in *El Paso.* This Court again, in *Cascade,* reversed and remanded, with directions that there be divestiture without delay, that a new District Judge be appointed to hear the case and that *de novo* hearings be conducted on the type of divestiture in accordance with the mandates and guidelines of this Court in *El Paso* and *Cascade.*

On remand the Honorable Hatfield Chilson, United States District Judge for the District of Colorado, was assigned to the District of Utah to conduct the further

divestiture proceedings required by *Cascade.* The court granted 26 motions to intervene, including the Appellant's, Utah Public Service Commission. *De novo* hearings were held from October 16, 1967 until March 21, 1968. Nine applicants for acquisition and 22 intervenors, including the Utah Public Service Commission, participated in these proceedings.

On June 21, 1968, after argument, the court entered its Findings of Fact, Conclusions of Law and Opinion. In its Opinion the court stated that its Findings of Fact, Conclusions of Law and Opinion:

> Are tentative and interlocutory in character and will remain so until after parties in interest have had an opportunity to object to the findings and determinations of the Court, be heard thereon and their objections ruled upon by the Court. (Ct's. Op., June 21, 1968, at pp. 108.)

Interested parties, including the Utah Public Service Commission filed detailed objections which were heard on August 23, 1968 and on August 29, 1968 the court overruled the Utah Public Service Commission's objections and entered a final judgment making its Findings of Fact, Conclusions of Law and Opinion, with minor modification, its Final Judgment of Divestiture.

The district court's Final Judgment of Divestiture selected CIG as the successful applicant to acquire New Company and tailored its plan to fit that selection. (Ct's. Op., June 21, 1968, at p. 82-83.) The court directed that specified assets be divested to Northwest Pipeline Corporation (New Company) and that CIG acquire all of that company's outstanding stock in exchange for five million dollars, CIG common in an amount to be agreed upon by CIG and El

Paso, and the assumption by New Company of approximately 170 million dollars of El Paso's bond and debenture debt.

It may come as a surprise to a Court that almost two years ago issued its second mandate requiring divestiture "without delay" and ordered that a new company "at once be restored," to discover that El Paso is still in control of the assets of Pacific Northwest and will remain so until the conclusion of all appeals in this litigation and until the requisite approvals have been obtained from the Federal Power Commission. (See Implementing Documents approved by the lower court November 7, 1968.) The evidence indicates that the continued operation of the Pacific Northwest assets by El Paso will not present El Paso with an unbearable burden since El Paso is presently netting $27,000 per day, after taxes, on the operation of these properties. (See California's Revised Motion for Appointment of Receiver and Immediate Transfer of Assets, as Amended and Supplemented, dated September 18, 1968.)

THE FACTS

CIG operates a natural gas transmission system serving Eastern Wyoming, Eastern Colorado and the Anadarko Basin. (See map, Appendix, at p. 131) CIG has no competition in its major markets. (Tr.-2769.)

In 1966 CIG had $260,973,384 in assets, operating revenues of $155,555,012 and net income of $12,641,420. Its revenue from gas sales increased from 18 million dollars in 1952 to $74,494,545 in 1968, or an increase of over 300%. (Tr.-2549, CIG-X1.) In 1966, it sold 344 billion cubic feet of natural gas and its natural gas sales accounted for 42%

of its net profit. (Tr.-2550.) CIG has a debt ratio of less than 50% and produced 37% of its own natural gas. (Tr.-2557, 2621.)

CIG's natural gas transmission system passes through the Continental Divide and interconnects with New Company's natural gas transmission system near Green River, Wyoming. (Tr.-3074; see Map, Appendix, at p. 131.)

CIG, under a contract running until 1976, purchases 100,000 mcf per day from New Company at the Green River interconnection. (Tr.-3035, 2549.)

New Company operates a natural gas transmission system running from the San Juan Basin in New Mexico through Utah to the major markets of the Pacific Northwest. New Company enjoys a complete monopoly in the Pacific Northwest. (Tr.-6491.)

By 1968, New Company operated 3,824 miles of pipeline (Tr.-54), had a gross plant investment of $337,341,000 (El Paso Plan of Divestiture, X12), total assets of $327,-646,000 (CIG Plan of Divestiture, X4), and sold 363 billion cubic feet of gas per year. (El Paso Plan of Divestiture, X111, sheet 2.) In 1968 New Company had total gas sales of $118,825,000 and net income after Federal Taxes of $8,092,000. (El Paso Plan of Divestiture, X13.) CIG's senior vice president admitted that the New Company divested by El Paso would be a viable and healthy business entity. (Tr.-2737, 3003-4.)

The acquisition of New Company by CIG will produce an industrial giant having $522,347,000 in total assets and gross receipts of $327,897,000. (CIG Plan of Divestiture, X4, X5, 1968 Estimates.) In terms of gross utility plant,

CIG would become the tenth largest natural gas transmission company in the United States and the fourth largest in the Western United States. (CIG X2, p. 1.) It would become the third largest natural gas company in terms of gas sales in the Western United States, exceeded only by El Paso and Pacific Lighting. (CIG X2, p. 2.)

Although CIG and New Company together will have 14.7 trillion cubic feet of natural gas reserves, both companies will have to substantially add to their existing reserves to serve the near term incremental demands of their existing markets. CIG testified that the system and reserves divested to New Company would satisfy the requirements of New Company's present markets through the 1968-69 winter season, assuming that the second Sumas Agreement was approved by the Canadian National Energy Board (Tr.-2634-35), and that after the 1968-69 winter season an additional gas supply would be required. (Tr.-3069, 3096.) Commencing in 1957, CIG had an oversupply of natural gas. (Tr.-2676.) CIG, however, testified that it would soon be out of its oversupply situation and CIG, since 1966, has been acquiring gas reserves in Wyoming, which CIG testified as "the bright spot . . . the area that has the most promise as far as our system is concerned." (Tr.-3038, 3034.) CIG estimated that it could meet the incremental demand of the eastern Slope with its present supply of facilities through the 1969-70 season and with limited expenses and improvements could meet the demands of that market through the 1975-76 winter season. (Tr.-2662.)

CIG presently draws the largest share — approximately 80% — of its present gas supply from the Anadarko Basin. New Company now draws its gas supply from the

San Juan Basin, Canada and the Big Piney Field of the Green River Basin. New Company draws 19% of its supply from the Green River Basin. (Tr.-2651.) CIG only draws five per cent of its supply from the same area (Tr.-2658) in the Deseret Springs Field, 75 miles distant from the Big Piney area. *Id.*

Competition, however, for reserves in the Anadarko Basin is substantial and, consequently, CIG has only been able to modestly add to its reserves in that area. (Tr.-2787, 3050-57.) CIG, consequently, repeatedly testified that it considered the Green River and Wind River Basins of Wyoming as the "bright spot" for the acquisition of future reserves. (Tr.-2670, 3005, 3038, 3093, 3095, *accord* Southern Companies X18.) CIG had acquired reserves in the Wind River Basin which it relinquished upon the failure of the Rock Springs project. (Tr.-3179.) CIG could not estimate its own reserves in the Green River Basin, let alone the potentiality of future reserves on uncommitted acreage. All CIG could say was that the Green River and Wind River Basins in Wyoming represented "tremendous potential." (Tr.-3006-08, 3095.) Thus, CIG, in its 1966 Annual Report to its stockholders, stated:

> The prospect for future gas supply additions in Wyoming within economically feasible distance of the pipeline is considered excellent. (CIG 1966 Annual Report, p. 4, CIG plan of Divestiture, X1.)

From the evidence introduced by CIG itself, it is uncontrovertibly clear that both New Company and CIG will have to acquire new reserves to meet the existing demands of their present markets in the near future and that both companies will have to look to the Green River and Wind River Basins in Wyoming to acquire such reserves. CIG

recognized that both New Company and CIG would have to look to the Wyoming area to develop reserves for a California project since there was not sufficient potential in the San Juan Basin. (Tr.-2669-70, 3008.) Even CIG would not testify that there was no possibility of competition between CIG and New Company for the acquisition of reserves in the Green River and Wind River Basins of Wyoming. (Tr.-3182, 3064, 3093.) Indeed, the probability of future competition is substantiated by the location of both companies' natural gas transmission systems in the Green River Basin, the immediate need of both companies to develop future reserves and the admitted vast potential of the Wyoming basins

The annual incremental demand of the California market is still booming and remains in the range of 200 million cubic feet per day. (Tr.-1058.) Since the original merger of El Paso and Pacific Northwest, the competitive situation has been altered. Transwestern now serves Southern California from the Delaware and Anadarko Basins. Since the construction of Transwestern's pipeline, Transwestern has been acquired by Texas Eastern, which ranks first in the nation in terms of total gas sales. PG&E has acquired Canadian gas through Pacific Gas Transmission, its wholly owned subsidiary. El Paso, itself, has more than doubled its natural gas sales. (Cts. Op. at p. 95. Nevertheless, it is evident from the record that California still presents a great commercial opportunity. The Southern Companies have stated that their incremental market requirements are sufficient to support a pipeline to California by 1970. (Cts. Op. at p. 95.) Southern California Edison's Exhibit 1 was an offer by Edison to purchase not less than 300,000 mcf per day. (Ed. X1.) The record, moreover,

amply demonstrates that California purchasers have been consistently willing to pay more than existing rates to finance new California competition. (El Paso Ex. 109.)

CIG is obviously a potential competitor for the incremental California market. CIG's lines are presently located 550 miles from the California market at Station 6 in the Green River Basin. CIG admittedly has the financial ability to mount a California project. (Tr.-2782-83.) CIG certainly claimed the management know-how to mount such a project. (Tr.-2829.) CIG, moreover, since the El Paso-Pacific Northwest merger, has made a major effort to enter the California market.

In the Rock Springs project, commenced in 1958, CIG entered into a joint venture with El Paso to supply gas to the California market. CIG was to construct, own and operate the portion of the pipeline running from Rock Springs, Wyoming, in the Green River Basin to Thistle, Utah. El Paso was to build, own and operate the portion of the pipeline running from Thistle, Utah, to the California border. Initial delivery was to be 400,000 mcf per day. Of this quantity, CIG was to furnish 300,000 mcf. (Tr.-2555. 2970-73.) The Rock Springs project terminated in 1963 when the FPC denied certification.

CIG estimated that initially a California project would require three trillion cubic feet of gas reserves. (Tr.-2664, 3006.) CIG claimed that CIG does not now have the gas reserves to serve the incremental demands of the California market. The lack of existing reserves is the only reason CIG gave in support of its claim that it could not now compete for the incremental demands of the California market. (Tr.-2665, 2676, 2788, 2829, 2878, 3050.)

All parties, however, recognized that neither CIG nor New Company, separately or jointly, at this time have existing reserves to serve the incremental demand of the California market. (Tr.-2634, 3069, 3090, 3096; Cts. Op., at p. 78.) Everyone recognized that for either New Company or CIG to mount a California project would require the development of additional reserves. Furthermore, CIG testified that Canadian gas was too high priced to compete for the incremental demands of the California market. (Tr.-2666, 2766.) The facts are, therefore, that CIG has the proximity to the California market, the financial ability to mount a project to the California market, and its present lines are located in Wyoming which has the potential to develop the reserves required by a California project. (Tr.-2670-71, 3005-08, 3022, 3093, 3095-96.) Finally, CIG consistently told the lower court that CIG had demonstrated the ability to acquire a substantial reserve in a limited period of time (Tr.-2624, 2676) and gave as proof of its ability to acquire substantial reserves in a short period of time its participation in the Rock Springs project, which was a project to supply the incremental demand of the California market. (Tr.-2624.) Thus, Mr. Pelican, Senior Vice President of CIG and President of its Pipeline Division, testified, "The present organization . . . proved its capacity to acquire a substantial reserve in a limited period of time as was evident in our try for the Rock Springs Project . . . ." (Tr.-2624.)

The court below recognized that there were other qualified applicants for the acquisition of New Company. (Cts. Op., at p. 93.) Even CIG admitted that New Company could compete for the California market without CIG. (Tr.-2765-66.) Clearly, if New Company, after eleven years

of El Paso's domination and control remained a competitor for the California market. CIG, with the same proximity, the financial ability, the management and the access to the same reserves, was a competitor for the incremental demand of that market.

CIG and New Company's gas transmission systems interconnect between their major markets in which they have a monopoly. The record contains no precise analysis of whether a new Rocky Mountain project can serve the incremental demand of the Pacific Notrhwest market, but there is abundant evidence to indicate that the growth of that market has been and will continue at a fantastic rate.

In the last ten years, the growth of the natural gas industry in the Pacific Northwest has been "extraordinary." (Kreager Testimony, at p. 13.) From 1957 through 1966, total gas sales in Washington, Oregon and Idaho increased over 200% from 71.6 billion cubic feet to 215.3 billion cubic feet and from $23.2 million to $77.2 million. (Kreager Testimony, at p. 12, WNGCo. X14.) Total ultimate consumers increased 164.4 per cent, from 156,997 in 1967 to 413,490 in 1966. (Kreager Testimony, at p. 13.) The growth of the natural gas industry paralleled the population and industrial growth of the region. In 1967, Puget Sound area of Washington built more new housing units than either Los Angeles, San Francisco-Oakland or San Diego, and general economic growth in the Pacific Northwest is now faster than the State of California. (Kreager Testimony, at pp. 10-11.) In the next 20 years, Pacific Northwest will grow faster than the nation as a whole, particularly in the three-county Puget Sound region surrounding Seattle. (Kreager Testimony, at p. 15.) By 1985, the Puget Sound region is predicted to have a popu-

lation increase over 1965 of 139 per cent, or an increase from a population of 1.5 million to 3.7 million. (WNGCo. X2.) In fact, in the rate of growth, measured by several economic criteria, the Puget Sound region in 1968 was the fastest growing metropolitan area in the nation. Correspondingly, Dr. Kreager, a professional economist, testified, "Demands for natural gas, for both domestic and commercial-industrial purposes, will increase dramatically." (Kreager Testimony, at p. 15.) The Washington Natural Gas Company will add 20,000 new customers per year for the next several years, as compared to the average annual increase of 7,000 new customers per year in the first years of natural gas service in its area. (Thorpe Testimony, at p. 4.) The Washington Natural Gas Company predicted that the natural gas transmission company serving the Northwest area will have to provide additional reserves and facilities to deliver additional annual increments of gas of approximately 65 million cubic feet per day for each of the heating seasons 1969-70 through 1971-72. (Thorpe Testimony, at p. 13.) Finally, it was Dr. Elroy Nelson's opinion that the gas requirements of the Pacific Northwest will increase at a greater rate than anywhere else in the United States. (Tr.-6491-92.)

CIG obviously agreed that the potential growth of the Northwest market was substantial, since it repeatedly testified that it thought the future of that market made the acquisition of New Company attractive regardless of the opportunity to compete in the California market. (Tr.-2793, 2825, 2932.) CIG, of course, has the financial ability and management know-how to mount a Pacific Northwest project on its own, and CIG's transmission system is in closer proximity to the markets of the Northwest than was

Pacific Northwest's system at the time it constructed its lines from the San Juan Basin to that market.

CIG, moreover, did not testify that the incremental demand of the Northwest market was insuffiicient to start a new project to that area. CIG merely testified that the sole reason CIG was not a potential competitor for the Northwest market was that CIG presently did not have an adequate gas supply to mount a project to serve the incremental demand of that market. (Tr.-2650, 3096.) Mr. Pelican, however, admitted that the problem of CIG's acquiring sufficient reserves to mount a Northwest project was the same problem that CIG had in developing sufficient reserves to serve the California market. (Tr.-3096.) Again, CIG's transmission system is presently located in the Wyoming basins in which CIG acknowledges that there is "tremendous potential" for the acquisition of future reserves (Tr.-2670, 3005-8, 3038, 3093, 3095; *accord,* Southern Companies X18.), and CIG's system, which transects the Continental Divide, has access to the development of the reserves in the entire Rocky Mountain area, including Wyoming, which were estimated to be between 40 and 43 trillion cubic feet. (Tr.-7134.)

The record, moreover, indicates that the incremental demand of the Northwest market may well be served by Rocky Mountain as opposed to Canadian gas. Mr. Pelican testified that if the price of Canadian gas increased to the original price of Canadian gas in the Sumas proceedings — 34 cents per mcf — Rocky Mountain gas could compete in the Northwest against that price (Tr.-3088-89.)

CIG's own markets are growing at a far less dramatic rate. While eastern Colorado has also experienced sub-

stantial growth, its growth is far less than the Pacific Northwest's (Tr.-2661-62.) At the present time, CIG predicts that its average annual increase would be 20,000 mcf per day, or about one-tenth of the incremental increase in the California market. (Tr.-2662.) CIG's customers also enjoy favorable rates (Tr.-2649) that would serve as a barrier to new entry.

Appellant concedes that it would be unlikely in the immediate future for New Company to become an actual competitor for the eastern slope market. New Company, however, is a present supplier for CIG for that market and is located in areas in which reserves will undoubtedly have to be developed for that market. (Tr.-3035.) The acquisition of New Company by CIG would enhance CIG's monopoly position on the eastern slope by gaining control of a major supplier and by eliminating the only neighboring natural gas transmission system.

Finally, CIG not only purchases a substantial quantity of natural gas from New Company, but CIG and New Company share several customers in common. Both companies sell to Plateau Natural Gas Company, Western Slope Company and, most important of all to Appellant, Mountain Fuel Supply Company, the natural gas transmission company serving Utah's requirements. (Tr.-2648, 3071.)

The net effect of CIG's acquisition of New Company is that it will extend CIG's monopoly through acquisition from the eastern slope to the Pacific Northwest, enhance its monopoly power in both markets, foreclose competition for the acquisition and development of gas reserves and foreclose potential competition for the California market.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The lower court's decision in this important antitrust case conflicts with the controlling decisions of this Court authoritatively interpreting Section 7 of the Clayton Act. *FTC.* v. *Procter & Gamble Co.,* 386 U.S. 568 (1967); *United States* v. *Von's Grocery Co.,* 384 U.S. 270 (1966); *United States* v. *Pabst Brewing Co.,* 384 U.S. 546 (1966); *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158 (1964); *United States* v. *Aluminum Company of America,* 377 U.S. 271 (1964); *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651 (1964); and *United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963). After winning its lawsuit in *El Paso* the Government has shown little interest in winning its cause either in Cascade or in the court below. Acquiescence in the acquistion of New Company by CIG will but further encourage the refusal of the lower courts to recognize that effective antitrust enforcement requires not easy but effective divestiture that eliminates the trend toward concentration. See *United States* v. *Aluminum Company of America,* 1967 CCH Trade Cases, ¶ 71,980 judgment vacated, 1967 CCH Trade Cases, ¶ 72,246, on remand from *United States* v. *Aluminum Company of America, supra,* (judgment vacated by stipulation when Alcoa sold Rome to a purchaser other than Okonite); *United States* v. *Kennecott Copper Corp.,* 249 F. Supp. 154 (SDNY, 1965), on remand from the *United States* v. *Kennecott Copper Corp.,* 231 F. Supp. 95 (SDNY, 1964) *aff'd.* 331 U.S. 414 (1965). See also, ADAMS *Dissolution, Divorcement Divestiture: The Pyrrhic Victories* of *Antitrust,* 27 Ind. L.J. 1 (1951).

1. *The selection of CIG forecloses competition for the California market in violation of Section 7.* The lower court found that there were applicants other than CIG that were qualified to make New Company a competitive factor in the California market. (Ct's Op., at p. 93.) The Government and all intervenors who assessed the applicants agreed. (Gov't. Br. of Aug. 19, 1968, at p. 8. The court, however, conceived that it was its responsibility not only to select an applicant qualified to make New Company a competitive factor in the California market, but to select the applicant

> Which in the Court's opinion can and will furnish through New Company, the greatest degree of competition and the greatest impact on the California market. (Court's Op., at p. 93.)

The lower court thus erroneously determined that the mandate of this Court in *Cascade* directing that

> A new company be at once restored to a position where it could compete with El Paso in the California market, *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co., supra,* at p. 136.

sanctioned a deviation from this Court's consistent rejection of the "countervailing power" defense to a Section 7 violation. *United States* v. *Philadelphia National Bank, supra; United States* v. *Penn-Olin Chemical Co., supra;* and *United States* v. *Continental Can Co.,* 378 U.S. 441 (1964).

The court was promoted into adopting this erroneous legal standard by the ubiquitous position of the Government. The Government in its Brief of May 15, 1968, told the Court:

> CIG must be regarded as among the more likely potential independent entrants into the California

market. (Gov't. Br., May 15, 1968, at p. 31.),

but it then advised the Court:

> We do not think, however, that CIG should be automatically excluded from consideration here because it is now a potential competitor for the California market. If the combination of CIG and New Company were to create a considerably stronger competitor for the California market than either one could possibly be alone, the Court could validly conclude that such a combination is procompetitive rather than anticompetitive, and entirely consistent with the mandate of the Supreme Court. (*ibid,* at p. 32.)

Having proposed an erroneous legal standard the Government could not even suggest to the Court what conclusion was warranted under its application. All it could do was tell the Court that it was "a very close question." (*ibid,* at p. 33.) After the Court entered its tentative findings on June 21, 1968, selecting CIG, the Government, in its objections on August 19, 1968, finally did tell the Court:

> Although the opinion briefly lists a number of competitive advantages which it finds in the CIG application, it makes no finding as to the degree in which the same advantages may be provided by other applicants. In our view the advantage which CIG would be likely to have over the other qualified applicants in a number of the stated respects is, at best, a very small one. (Gov't Br., dated August 1968 at p. 8) (Emphasis Supplied.)

In this respect Appellant notes that on September 30, 1968, the FPC in docket number CP67-187 authorized El Paso Natural Gas Company to construct $118,000,000 in new natural gas facilities and to furnish California with an additional 257 million cubic feet per day to serve the near term incremental demand of the California market. The

Commission, in its decision, rejected the staff recommendation for a 42 inch pipeline. The Commission's action is significant because the district court, in its opinion, placed great weight on the CIG-New Company combination being able to compete for the 42 inch line which would serve all increments to Southern California for the foreseeable future. (Ct's. Op., at pp. 95-96.)

This Court, as early as *Philadelphia National Bank* rejected the "countervailing power" defense since it would serve as a justification for concentration to beget concentration. *United States* v. *Philadelphia National Bank, supra,* at p. 370. It adhered to its ruling in *United States* v. *Continental Can Co., supra,* at p. 464, and in *United States* v. *Penn-Olin Chemical Co., supra,* it again adhered to it when the Court held that the Government had established a *prima facie* violation of Section 7, even though two firms prior to the joint venture entry controlled 90% of the market and even though the district court found that the joint venture would offer greater competition than individual entry by one of the potential competitors. *United States* v. *Penn-Olin Chemical Co., supra,* at pp. 163, 173.

This Court's mandate in *Cascade* did not condone a deviation from this Court's consistent rejection of the "countervailing power" defense. In directing that a competitor be restored that could compete for the California market, this Court in *Cascade* spoke in the context of a divestiture decree that basically provided for a division of markets, with the Pacific Northwest market going to New Company and the California market to El Paso. Its mandate spoke to that situation and looked to a divestiture of a competitor that could compete in the California market, but this Court made clear that the criterion that shaped

its mandate was the enforcement of Section 7 of the Clayton Act. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co., supra,* at p. 142.

The district court dismissed CIG's competitive effort to enter the California market in the Rock Springs project as "one incident." (Ct's. Op., at p. 101. The lower court stated that

> Acting alone, its (CIG's) potential for being a competitor in the California market in the foreseeable future is so uncertain that it should not be grounds for the exclusion of CIG from consideratoin." (Ct's. Op., at p. 101.

Clearly, on the undisputed and objective facts, CIG is a potential competitor of the California market. Even the Government reached that conclusion. The California market is still rapidly expanding and the potentiality for new competition exists. CIG has proximity to the market. CIG's lines now pierce the Continental Divide at a point 550 miles from the California market. Indeed, its transmission system now extends further west than any other pipeline not presently serving the California market and at a point from which CIG mounted the Rock Springs project. CIG admittedly has the financial ability and the managerial know-how to finance, construct and operate an entry into the California market. CIG has immediate access to the vast reserves of the Wyoming basins, part of which it relinquished on the failure of the Rock Springs project and it can, with comparative ease, reach reserves in other areas of the Rocky Mountain region. Certainly it is in a better location to mount a California project than was Transwestern when it built its lines to California from the Permian Basin.

CIG's subjective disclaimer of any intent to compete in the California market cannot overcome these undisputed and objective economic facts. *FTC* v. *Procter & Gamble Co., supra,* and *United States* v. *Penn-Olin Chemical Corp., supra.* CIG's disclaimer, moreover, cannot rest on the reason that CIG advances in support of it. CIG states that the reason that it cannot compete in California is that it does not have the present existing reserves for such a project. The fact is that CIG has the ability to develop such reserves in the area of its present transmission system. Finally, CIG's disclaimer is belied by CIG's participation in the Rock Springs Project. Obviously CIG is not only a present potential competitor for the California market, but for five years, from 1958 through 1963, it actually attempted to enter that market.

This Court has recognized the importance of potential competition in ascertaining the anticompetitive effect of a corporate acquisition or joint venture under Section 7 of the Clayton Act. *FTC* v. *Procter & Gamble Co., supra,* and *United States* v. *Penn-Olin Chemical Corp., supra.* In *Penn-Olin* this Court held that the foreclosure of potential competition established a *prima facie* violation of Section 7 even though there was no showing that the potential competitors had had any significant influence prior to entry on the market in question and even though one of the competitors was not presently engaged in the line of commerce in question.

Potential competition, as this Court recognized in *El Paso,* is of even greater significance in the natural gas industry. Indeed, in the natural gas industry it is difficult to draw a line between potential and actual competition. The competition that exists is competition for the incre-

mental demand of a market. The competitive opportunity to serve such demands are infrequent. The contracts for the sale of natural gas involve large quantities, are for long terms and frequently require that the successful competitor construct new facilities over many miles to serve a new market. This competitive analysis was not only recognized by this Court in *El Paso,* it is substantiated by the competitive history of the California market. Since the illegal acquisition of Pacific Northwest by El Paso two competitors have entered the market with reserves located at points much further removed from the California market than the Wyoming basins. Transwestern was not even engaged in the natural gas transmission industry before it constructed its California project.

The industrial experience, financial ability, geographic location and competitive history of CIG and New Company teaches that they are both potential competitors for the incremental demand of the California market. As in *Penn-Olin,*

> This array of probability certainly reaches the *prima facie* stage . . . to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. *United States* v. *Penn-Olin Chemical Corp., supra,* at p. 175.

The natural gas industry is certainly highly concentrated. It is oligopolistic if not monopolistic. The need to preserve competition in the industry is directly related to the small number of competitors and their vast economic power. CIG and New Company, together, may be a stronger California competitor than either company alone. The anticompetitive effects of the acquisition, however, cannot be condoned on the basis that the economic power of the existing California competitors requires the combina-

tion of potential California competitors to make a stronger potential California competitor. This Court has already rejected such an argument when in *United States* v. *Aluminum Company of America,* it stated:

> If this argument were valid, then once a market had become unduly concentrated, further concentration would be legally privileged. On the contrary, if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great. *United States* v. *Aluminum Company of America, supra,* at p. 279.

In *Penn-Olin* this Court held that if it was reasonably probable that one of two potential competitors would have entered the market while the other remained a significant potential competitor, the entry of both competitors by means of a joint venture foreclosing potential competition violates Section 7 of the Clayton Act, even though the joint venture may have been a stronger competitor than the entry of any single competitor. In *Penn-Olin* there was no permanent corporate acquisition increasing economic concentration. In *Penn-Olin* the new market entry of Penn-Olin was certain. In *Penn-Olin* the joint venture actually increased competition. Here it is only certain that the acquisition of New Company by CIG will produce greater concentration in an already highly concentrated industry and that potential competition between CIG and New Company for the California market will be eliminated. Under the decisions of this Court such certainty constitutes a violation of Section 7 of the Clayton Act. *United States* v. *Penn-Olin Chemical Co., supra; United States* v. *Von's Grocery Co., supra;* and *United States* v. *Aluminum Company of America, supra.*

2. *The acquisition of New Company by CIG "may be substantially to lessen competition" in the acquisition of gas reserves in Wyoming in violation of Section 7 of the Clayton Act.* The lower court, despite Appellant's objection, made no findings of the effect of the acquisition of New Company by CIG on the acquisition of gas reserves in Wyoming. The line of commerce in this litigation obviously includes the acquisition and production of natural gas. (See Gov't's claim in *El Paso* on the acquisition of gas reserves in the San Juan Basin. The lower court apparently conceived that under *Cascade* it was only its duty to create the strongest possible competitor for the sale of natural gas in the California market regardless of the effect on competition in other markets and in other phases of the natural gas industry. In so doing, the lower court errored. This Court has previously made it clear that the primary objective of an (antitrust) decree to remedyl a Section 7 violation is to give "complete and efficacious effect to the prohibitions of the statute." *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 327 (1961) This Court has further held that a corporate acquisition will violate Section 7 of the Clayton Act if that acquisition has the requisite anticompetitive effect in any section of the country, *United States* v. *Pabst Brewing Co., supra,* and that the procompetitive effect in one market cannot be used to justify the anticompetitive effects in another. *United States* v. *Philadelphia National Bank, supra.* Therefore, even assuming *arguendo* that the acquisition of New Company by CIG was procompetitive in terms of the sale of natural gas in California, the acquisition of New Company by CIG would violate Section 7 if such acquisition would foreclose competition in the acquisition of natural gas reserves in the Wyoming basins The overwhelming

probability if not the veritable certainty is that CIG's acquisition of New Company will foreclose competition for the acquisition of natural gas reserves in Wyoming.

The lower court recited that CIG presently takes 80% of its gas supply from the Anadarko Basin while New Company presently draws its gas supply from Canada, the San Juan Basin and the Big Piney Field in Wyoming. The lower court accurately recited that at the present time there is no field from which both companies take natural gas and that the New Company's supply in the Big Piney Field in Wyoming is 75 miles distant from CIG's supply in the Deseret Springs Field in Wyoming. The recitation of these facts, however, does not fully or accurately portray the competitive situation with regard to the acquisition of Wyoming gas reserves.

The natural gas transmission systems of both companies are now located in the Green River Basin. Both companies now draw natural gas from the Green River Basin — New Company from the Big Piney Field and CIG from the Deseret Springs Field. CIG and New Company are two of the three natural gas transmission companies now taking gas from the Green River Basin and are the two largest companies drawing gas from this basin. Both companies must acquire new reserves in the immediate future to serve the incremental demands of their existing markets, and, it is clear, that both companies will have to look to the tremnedous potential of the Wyoming basins to acquire such reserves.

CIG testified that the present competitive situation in the Anadarko Basin makes it unlikely that it will be able to substantially increase its reserves in that area. CIG, since 1966, has been acquiring gas reserves in the Green

River Basin in Wyoming and in its Annual Report of 1966 it told its stockholders that Wyoming was the bright spot for the acquisition of future reserves.

The development and exploration that has taken place in the Green River and Wind River Basins has primarily been around the edge of such basins in the structurally high areas and the deeper portions of such basins remain relatively untested. (Tr.-2670.) It is these deep portions that will "be the dominate target of future exploration." (Haun, Summary of Testimony, at p. 1.) The lack of exploration makes it impossible to accurately estimate the reserve potential of such basins, but CIG repeatedly testified that the Green River and Wind River Basins in which CIG had acquired reserves at the time of the Rock Springs project had "tremendous potential." (Tr.-3006.)

In summary, CIG and New Company's natural gas transmission systems are presently both located in the Green River Basin of Wyoming. CIG and New Company presently draw gas from fields only 75 miles part in the Green River Basin and CIG and New Company's systems have ready access to the undeveloped reserves of the Green River and Wind River Basins. CIG and New Company are the two largest and two of the three natural gas transmission companies now drawing gas from the Green River Basin. CIG and New Company both must immediately develop additional reserves to serve the near term incremental demand of their respective markets and certainly would have to devlop such reserves in order to mount a California project. Neither the San Juan Basin nor the Anadarko Basin from which New Company and CIG, respectfully, now draw their major source of supply offer the opportunity for the development of substantial additional

reserves and both companies must look to Wyoming, which is an area of tremendous potential, to develop the future reserves that their systems require. This summary of undisputed facts taken from CIG's own testimony can only lead to the conclusion under settled authority that the acquisition of New Company by CIG "may be to substantially lessen competition" in the acquisition of gas reserves in Wyoming. *United States* v. *Von's Grocery Co., supra; United States* v. *Pabst Brewing Co., supra; United States* v. *Aluminum Company of America, supra;* and *United States* v. *Philadelphia National Bank, supra.*

3. *The acquisition of New Company by CIG "may substantially lessen competition" in the sale of natural gas in Utah and Western Colorado in violation of Section 7 of the Clayton Act.* New Company and CIG presently share three common customers — Plateau Natural Gas Company, Western Slope Company and Mountain Fuel Supply Company. CIG furnishes gas to two of the customers, Plateau Natural Gas Company and Western Slope Company, on the eastern side of the Continental Divide, while New Company furnishes them gas on the western side of the Divide. Mountain Fuel Supply presently purchases gas from both New Company and CIG on the same line in the Green River Basin although New Company is presently a substantial supplier of Mountain Fuel Supply, CIG only supplies Mountain Fuel a relatively small quantity of gas on a short term basis. Mountain Fuel, however, historically has purchased a large quantity of its natural gas requirements from other natural gas companies. (*United States* v. *El Paso Natural Gas Co.,* Oct. term, 1962, Case No. 94, Gov't. Br., App. B, GX-15.) Mountain Fuel, furthermore, presently draws a substantial quantity of its natural gas

requirements from the Green River Basin. The acquisition of New Company by CIG will foreclose the only available competition for Mountain Fuel's needs in the future. While such foreclosure may seem relatively insignificant in terms of other anticompetitive consequences of CIG's acquisition of New Company, it is of substantial concern to the Appellant and under settled authority would independently constitute the requisite anticompetitive effect that would condemn CIG's acquisition of New Company. *United States* v. *Von's Grocery Co., supra.*

4. *The extension of CIG's monopoly from Eastern Colorado to the Pacific Notrhwest by acquisition and the enhancement of CIG's monopoly power in both markets constitutes a violation of Section 7 of the Clayton Act.* CIG's acquisition of New Company extends CIG's monopoly from Eastern Colorado to the Pacific Northwest. The acquisition will further enhance the monopoly power of both companies in their respective markets. The undisputed facts demonstrate that the natural gas market of the Pacific Northwest is booming and that its rapid growth rate will continue in the years ahead. By proximity, management, financial resources, the availability of gas reserves and the ability to develop them, CIG qualifies as a potential competitor to serve the incremental demand of the Pacific Northwest. Appellant concedes that the record does not disclose whether a new project to serve the incremental demand of the Pacific Northwest with Wyoming-Rocky Mountain gas is feasible now or in the immediate future. Certainly the fact that the Pacific Northwest Pipeline Corporation initially served the demand of that region with reserves from these areas and the San Juan Basin indicates that such a project is at least possible if

not probable. Whatever the probabilities of CIG's future competition in the Pacific Northwest, there is no question that the foreclosure of CIG's potential competition, whatever the degree of that competition, enhances the monopoly power of New Company in that region. The monopoly power of the CIG-New Company combination is further enhanced by CIG's acquisition of a major supplier, by the foreclosure of competition for the Wyoming reserves and by the foreclosure of any future competition from New Company for CIG's major markets. Finally, the monopoly power of this combination is demonstrably enhanced by the shear increase of economic power as a result of this acquisition.

This Court has repeatedly noted that the primary objective of Section 7 was to prevent economic concentration in the American economy. Applying this principle this Court has held that a merger of two companies having 7.5% of the combined Los Angeles retail grocery market violates Section 7 of the Clayton Act when there was a trend toward concentration in that market. *United States* v. *Von's Grocery Co., supra.* In *Von's Grocery* this Court determined on these facts that the requisite probably anticompetitive effect existed without attempting to analyze the actual competitive impact of the merger on the market. The Court has further held that in a highly concentrated oligopolistic market Alcoa's acquisition of a competitor having 1.3% of the aluminum conductor market violated Section 7. The Court said where concentration is already great "the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *United States* v. *Aluminum Company of America, supra,* at p. 279.

If a slight increase in economic concentration as a result of merger between direct competitors in markets having a trend toward concentration, or in a highly concentrated market results in the probable anticompetitive effect condemned by Section 7, the Appellant submits that any significant extension or enhancement of monopoly power through acquisition by a firm having a monopoly in an important line of commerce in a major section of the country *a fortiori* constitutes a violation of Section 7.

This Court has held that "all mergers are within the reach of § 7 and all must be tested by the same standard, whether they are horizontal, vertical, conglomerate or other." *FTC* v. *Procter & Gamble Co., supra,* at p. 577. The rationale of *Von's Grocery* and *Aluminum Company of America* is, therefore, applicable to all mergers, not just merely mergers between direct competitors. This Court has used concentration as the economic criterion to predict probable anticompetitive consequences on the experience that economic concentration produces the risk that large ostensible competitors rather than compete will follow parallel policies of mutual advantage and that economic concentration and the associated accumulation of economic power makes market entry more difficult. In short, significant economic concentration is condemned because it tends to produce the economic evils of monopoly. If significant economic concentration results in the requisite anticompetitive effect because it tends to produce monopolistic business practices, then a merger that strengthens and extends monopoly power must produce the probable anticompetitive effect condemned by Section 7.

5. *This Court having established that the acquisition of Pacific Northwest by El Paso violated Section 7 of the*

Clayton Act, the acquisition of New Company by CIG is improper if there is any substantial likelihood that the tendency toward monopoly has not been eliminated, and alternative means of divestiture remain. This Court has held that a divestiture decree to remedy a Section 7 violation is improper even though the implementation of the decree does not independently violate Section 7 of the Clayton Act if it appears "that the decree entered leaves a substantial likelihood that the tendency toward monopoly of the acquisition condemned by Section 7 has not been satisfactorily eliminated." *United States v. E. I. du Pont de Nemours & Co.,* 366 U.S. 316, 331-32 (1961). In short, a divestiture decree issued in a Section 7 litigation is governed by a stricter anticompetitive standard than Section 7 of the Clayton Act.

In *du Pont* the Supreme Court spoke in the context of a divestiture decree that solely divested voting rights to remedy an illegal stock acquisition. The standard of *du Pont* cited above, however, is applicable to the enforcement of all divestiture decrees formulated to remedy a Section 7 violation and the Government has advocated in this Court that that standard be used to assess the propriety of a Section 7 divestiture decree providing for the sale of an illegally acquired company to a third party. *United States v. Aluminum Comapny of America,* Oct. Term, 1967, No. 277, Government Jurisdictional Statement (hereinafter referred to as "Gov't Statement").

In *Alcoa* the Government claimed that the district court had applied an improper standard in determining the anticompetitive effect of the divestiture of Rome to Okonite. The Government contended that under *du Pont*

it was not required to show that the divestiture to Okonite violated Section 7. The Government's primary argument was that under *du Pont* the court was called upon to determine whether the divestiture decree providing for the sale of Rome to Okonite left a substantial likelihood that competition in the industry remained significantly less than it would have but for the original violation, and if so, whether there were alternative means of divestiture. (Gov't St. at p. 10) Utah contends that the same standard advocated by the Government as the appropriate test to determine the propriety of the divestiture of Rome to Okonite in *Alcoa* should be applied in determining the propriety of CIG's acquisition of New Company. Under such a test, it is clear that CIG's acquisition of New Company does not eliminate the tendency toward monopoly condemned in *El Paso*.

Although the district court with the support of the Government and all other intervenors who assessed the applicants properly found that other applicants were qualified to acquire New Company and to make New Company a competitor for the California market, the district court did not apply this *du Pont* test in determining whether CIG should acquire New Company. The Government, contrary to its position in *Alcoa* did not suggest that the lower court apply this test, Utah did. No other applicant is presently engaged in the natural gas transmission industry and no significant anticompetitive problems will be presented by any other applicant's acquisition of New Company. Appellant submits, therefore, that the district court, under *du Pont,* should have selected another applicant.

CONCLUSION

The acquisition of New Company by CIG nullifies the complete and efficacious enforcement of Section 7 of the Clayton Act. The questions presented are substantial and are entitled plenary consideration.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION
CIVIL ACTION No. 143-57

UNITED STATES OF AMERICA,
Plaintiff,

— vs. —

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND OPINION

Dated June 21, 1968

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND OPINION

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND OPINION

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PRELIMINARY STATEMENT

The following is a brief summary of the facts and background which lead to the present phase of this litigation. A more detailed account is found in three decisions of the Supreme Court:

California v. *Federal Power Commission,* 369 U. S. 482.

United States v. *El Paso Natural Gas Co.*, et al., 376 U. S. 651.

Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.,* et al., 386 U. S. 129. (Referred to as Cascade)

Prior to the year, 1954, El Paso Natural Gas Company (El Paso) was engaged in the business of transporting natural gas interstate to the California border for sale to distributors who distributed the gas to users in southern California. At that time, El Paso was the sole out-of-state supplier to the California market.

In 1954, Pacific Northwest (PNW) received the approval of the Federal Power Commission to construct and operate a pipeline from the San Juan Basin in New Mexico to the State of Washington to supply gas to the then unserved Pacific Northwest area. The pipeline was completed and service was begun in 1956.

PNW had obtained authorization to receive large quantities of Canadian gas and, in addition, had acquired Rocky Mountain gas reservoirs along its route and gas reserves in the San Juan Basin. In 1954, PNW tried to enter the rapidly expanding California market by transportation of Canadian gas to Pacific Gas & Electric Co. (PG & E) in northern California, and the effort was renewed in 1955. In 1956, PNW negotiated with Southern

California Edison Co. (Edison) to supply it with natural gas.

Although PNW had no pipeline into California and its efforts to enter the California market were unsuccessful, these efforts were a substantial competitive factor in the California market and led to a price reduction and other concessions to the ultimate benefit of Edison.

El Paso had been interested in acquiring PNW since 1954. The first offer from El Paso was in December 1955, an offer PNW rejected. Negotiations were resumed by El Paso in the summer of 1956, while PNW was still trying to obtain entry to the California market.

In November of 1956, El Paso offered to exchange El Paso shares for PNW shares. This offer was accepted by PNW directors and by May 1957, El Paso had acquired 99.8 percent of PNW's outstanding stock.

In July 1957, the Department of Justice filed suit against El Paso in the U. S. District Court for the District of Utah charging that the stock acquisition violated Section 7 of the Clayton Act.

In August 1957, El Paso applied to the Federal Power Commission for permission to acquire the assets of PNW, and on December 23, 1959, the commission approved and the merger of PNW with El Paso was effected on December 31, 1959. California, an intervenor in the proceedings, obtained a review by the Court of Appeals, which affirmed the Commission (111 U. S. App. D. C. 226, 296 F.2d 348). The Supreme Court granted certiorari and set aside the Commission's approval, holding that it should not have acted until the District

Court had passed on the Clayton Act issues. *California v. Federal Power Commission,* 369 U. S. 482 (supra).

Meanwhile, (in October 1960) the United States amended its Complaint in the District Court so as to include the asset acquisition by merger in the charge of violation of the Clayton Act. Upon trial of this action, the District Court found for El Paso; the U. S. appealed; the Supreme Court, on review of the record which was composed largely of undisputed evidence, concluded that the effect of the acquistion "may be substantially to lessen competition" within the meaning of Section 7 of the Clayton Act, reversed the judgment and remanded with directions to the District Court "to order divestiture without delay." *United States* v. *El Paso Natural Gas Company,* et al., 376 U. S., p. 651 (supra).

Upon remand to the District Court, motions to intervene by the State of California, Southern California Edison Company, (Edison) and Cascade Natural Gas Company (Cascade Company) were denied, and the District Court entered a decree of divestiture which had been agreed upon by the Department of Justice and El Paso.

California, Edison, and Cascade Company appealed from the denial of their motions to intervene. The Supreme Court in *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Company,* et al., 386 U. S. 129 (supra) reversed the District Court and remanded with directions to allow each appellant to intervene as a matter of right and that the proceedings be reopened to give California, Edison, and Cascade Company an opportunity to be heard as intervenors.

The Court also held that the agreed decree, entered by the District Court, was not in accord with the Supreme Court's mandate in 376 U. S. 651 (*supra*) which required that PNW, or a new company, be at once restored to a position where it could compete with El Paso in the California market; ordered the District Court to vacate the orders of divestiture previously entered; "have de novo hearings on the type of divestiture" the Court envisioned and made plain in its opinion in 376 U. S. 651; directed "- - - there be a divestiture without delay - - -"; suggested guidelines that should be followed in ordering the divestiture and ordered that a different District Judge be assigned to hear the case.

PROCEEDINGS SINCE CASCADE

(For further detail see Appendix)

On April 18, 1967, the undersigned was assigned to the District of Utah to conduct the further proceedings required by Cascade.

After a conference with counsel on June 9, 1967, the Court granted 26 Motions to Intervene; continued the Federal Power Commission as amicus curiae; ordered El Paso to file a plan for divestiture by August 4, 1967; ordered those desiring to acquire the divested properties (applicants for acquisition) to file proposals by August 25, 1967; and permitted intervenors until September 18, 1967, to file comments on the proposals made and to make proposals of their own.

On October 3, 1967, a pre-hearing conference was had; the "de novo" hearings were commenced on October 16, 1967, in Ogden, Utah; were recessed on Novem-

ber 15, 1967; were resumed on January 8, 1968, in Denver, Colorado, and the taking of evidence was concluded March 21, 1968.

Briefs were filed — the last one on May 25, 1968, and oral argument was had on June 3, 1968.

In addition to the plaintiff and defendant, the Federal Power Commission as amicus curiae, 22 intervenors and 9 applicants for acquisition participated in all or a part of the hearings.

The names of the participating intervenors and applicants for acquisition are set forth in the appendix.

SUMMARY OF PLANS PROPOSED

In accordance with the procedure prescribed by this Court, El Paso filed a divestiture plan (El Paso Exhibit 1) which is here summarized.

Thereafter, the applicants for acquisition filed their proposed plans, followed by the comments of intervenors, some of which made specific suggestions concerning the plans proposed. Edison suggested two alternate plans for divestiture.

SUMMARY OF EL PASO PLAN

Transfer of Assets to New Company

El Paso proposes to transfer to a corporate entity referred to herein as "New Company," all of the operating property acquired from Pacific Northwest and additions thereto, $5,000,000 for working capital, designated gas reserves, and certain other assets in exchange for all of New Company's common stock and New Com-

pany's assumption of approximtaely $170,000,00 face amount of El Paso's bond and debenture indebtedness, plus the cost of transferring this debt from El Paso to New Company (roll over cost) of an increase in the interest rate of one-eighth of one percent.

El Paso would sell up to 20 percent of New Company's common stock to the successful applicant selected by the Court, and the balance of eighty percent or more would be deposited by El Paso in a voting trust to be administered under Court supervision by a trustee who would be wholly independent of El Paso and who may, with the approval of the Court, be the purchaser.

Non-voting certificates of participation in the voting trust would be issued and distributed by El Paso to its common shareholders. These participation certificates would be exchangeable for the underlying shares of New Company common stock under Court-approved provisions which would effectively preclude El Paso, its officers, directors, and common shareholders from acquiring any shares of New Company common stock.

The voting trust would terminate at the end of ten years, at which time any remaining New Company shares not exchanged would be sold by the trustee for the benefit of the remaining certificate holders.

The limitation of the sale of New Company stock to a maximum of 20 percent and placing the balance in a voting trust for the benefit of El Paso stockholders is designed to qualify the divestiture as a "D" type reorganization under Section 368 and a spin-off under Section 355 of the Internal Revenue Code, which under Section 361 of the Code would result in no taxable income

to El Paso on the transfer of the assets to New Company. A sale of more than 20 percent of the New Company stock would not comply with the requirements of Section 368(c) of the Code, hence the 20 percent limitation.

The voting trust is proposed as the means to comply with the requirement of Cascade that New Company be insulated from domination by El Paso or its stockholders.

Sale Price of New Company Stock

The sale of up to 20 percent of New Company stock would be at a negotiated price. El Paso proposes that the Court select those applicants which it finds qualified and allow El Paso to negotiate separately with each of them and present to the Court the agreements negotiated. The Court would select the successful applicant, presumably the one paying the highest price.

Divestiture

The successful applicant would then acquire the management of New Company, and El Paso and New Company would file applications with Federal Power Commission for authority to transfer the divested properties to New Company for operation.

Westcoast and Northwest Production Stock

El Paso proposes to sell this stock to persons satisfactory to the Court as soon as practicable after the Court approves the plan of divestiture.

Reimbursement for Use of PNW's Tax Losses

El Paso proposes no reimbursement to New Company for its use of PNW's tax losses. El Paso claims that the tax losses were used to maintain lower rates in

the northwest division than otherwise would have been possible and thereby the benefits of the utilization of the tax losses were largely flowed through to the gas consumers in the northwest.

Inter-Company Contracts

El Paso proposes to reinstate the Sumas Exchange Agreement which provides for the purchase by El Paso of 100,000 MCF per day from New Company's reserves in the San Juan Basin and to reinstate the CIG contract, whereby New Company will honor an obligation of PNW to transport and deliver from the San Juan Basin to CIG at Rock Springs, Wyoming, a certain amount of gas.

El Paso also proposes negotiation of a mutual gas gathering agreement in the San Juan Basin on a cost-of-service basis.

(These contracts and their disposition are discussed in detail later in this opinion.)

GAS RESERVES

El Paso proposes to divest to New Company the following gas reserves:

1. All reserves attributable to all gas supply sources now held by El Paso in the San Juan Basin and elsewhere as a result of the acquisition of PNW stock, both in the form of leaseholds and contracts for the purchase of gas;
2. All contracts negotiated since January 1, 1957, for Canadian gas and for all other gas supplies located north of Ignacio, Colorado;
3. A division of the gas reserves in the San Juan Basin.

SUMMARY OF OTHER PLANS

During the course of the hearings, some plans were modified from the original proposals; but the final briefs of the applicants contain a summary of the plans as finally submitted. However, all applicants for acquisition stated that they desire to be considered as applicants under any plan which the Court might devise. With this qualification, the Court summarizes the more pertinent parts of the plans submitted for the Court's consideration.

SUMMARY OF ASPEN PLAN

Aspen accepts El Paso's proposal to convey the assets to be divested to New Company, with New Company assuming the bond and debenture indebtedness as proposed by El Paso. El Paso would receive all of the stock of New Company, except an amount to be determined by the Court which would go to the founders of Aspen as founders' shares. Aspen suggests three percent. The remainder of the New Company stock would be deposited by El Paso in a voting trust as proposed, but the trust would be limited to five years. Aspen's plan eliminates the sale of any New Company stock by El Paso.

At an appropriate time, Aspen would merge with New Company.

The West Coast and Northwest Production stock would be divested to New Company, sold by it, and the net proceeds after payment of taxes would be used as working capital.

Aspen desires no reimbursement for El Paso's utilization of PNW's tax losses.

Aspen accepts El Paso's proposals regarding the inter-company contracts.

Aspen accepts El Paso's division of the gas reserves as fair and equitable.

SUMMARY OF COLONIAL'S PLAN

Colonial accepts El Paso's proposal with certain modifications, and is prepared to purchase up to 20 percent of the New Company stock at a negotiated or Court-determined price.

West Coast stock should be transferred to New Company at book value and sold by New Company.

As to inter-company contracts, Colonial suggests the reinstatement of the Sumas Exchange Agreement with an option to cancel on 18 months' notice; reinstatement of Colorado Interstate Contract; non-reinstatement of Kingsgate Agreement and reinstatement of the San Juan Gathering Agreement at the old price subject to negotiation under the requirements of the natural gas act.

Colonial believes that the total gas reserves to be divested have been overestimated, and that the New Company-San Juan reserves should be supplemented; or, there should be an exchange of New Company Basin-Dakota reserves for additional Mesaverde reserves. El Paso should convey to New Company the exploratory acreage acquired by El Paso since the stock acquisition in basins located in the northwest division area.

SUMMARY OF COLORADO INTERSTATE PLAN

CIG accepts El Paso's proposals with substantial modifications.

CIG proposes to furnish its own working capital.

CIG would reimburse El Paso for the divested assets at fair market value to be determined by negotiation with El Paso.

CIG would accept El Paso's proposal that the assets be divested to New Company; New Company assume approximately $170,000,000 of the debt and debenture indebtedness, plus the roll over cost. For its equity, El Paso would receive preferred stock of New Company convertible into CIG common. CIG would receive 100 percent of the New Company common stock in exchange for $5,000,000 in cash plus sufficient stock of CIG to satisfy the conversion requirements of New Company preferred stock.

Appropriate restrictions would be included in the divestiture decree to insulate New Company and CIG from domination or control by El Paso, its directors, officers, or major stockholders.

CIG proposes the acceptance of El Paso's division of the gas reserves, subject to modification of the Sumas Exchange Agreement, either by reducing deliveries to 50,000 MCF per day, commencing in 1971 and terminating after 1973, or an option by CIG to cancel the agreement on reasonable notice.

CIG accepts El Paso's proposal with reference to the West Coast and Northwest Production stock, the tax

loss carry over, and the inter-company contracts, except for the proposed modification of the Sumas Exchange Agreement.

SUMMARY OF CONTINENTAL-PACIFIC (COPACO) PLAN

Copaco accepts the El Paso plan with modifications.

Copaco would merge into New Company and Copaco stockholders would, as a result of the merger, receive common stock of New Company on the basis of one share for each $12.50 of capital provided to New Company by Copaco. Thus, Copaco would obtain 480,000 shares of New Company stock (9.16 percent); New Company by the merger would receive $6,000,000 in cash, and El Paso would receive 90.84 percent of the New Company stock. El Paso would have the right, subject to Court approval, to sell approximately 10 percent of the New Company stock or offer to exchange that much with El Paso shareholders for El Paso common. The remaining New Company stock (80 percent or more) would be placed in a voting trust as proposed by El Paso.

Copaco does not propose divestment of West Coast and Northwest Production stock to New Company and does not propose a reimbursement by El Paso for the use of PNW's tax losses; but should such a reimbursement be made, it should be used as a reserve to lower the book value of the property to be divested by El Paso.

SUMMARY OF GREAT LAKES PLAN

Great Lakes adopts the El Paso plan including the non-divestment of West Coast and Northwest production stock and no reimbursement for tax loss carry over. However, Great Lakes suggests that the voting trust should be for a period of 10 - 15 years; that there should be an independent trustee and that the trustee should not be ocntrolled either by El Paso or New Company.

SUMMARY OF PACIFIC WESTERN'S PLAN

Pacific Western proposes the assumption of a proportionate part of El Paso's bond and debenture indebtedness and a cash purchase of the equity. The purchase price would be based on book value of the utility assets and West Coast stock; or, if the Court so decides, the fair market value. The funds for the purchase would be obtained from a public sale of Pacific Western stock.

As an alternative plan, Pacific Western proposes to acquire the equity in the divested assets by a stock exchange as follows:

1. Pacific Western would exchange its stock with El Paso stockholders in return for all of their El Paso stock.
2. El Paso would transfer the assets and related liabilities to New Company in return for 100 percent of New Company stock.
3. El Paso would transfer the stock of New Company to Pacific Western, solely in exchange for the shares of El Paso acquired by Pacific Western.
4. Pacific Western would merge with New Company.

Pacific Western believes such an exchange is a tax-free transaction.

West Coast stock should be sold by El Paso and the net profit after taxes should be credited to New Company.

Northwest Production stock to be retained by El Paso.

El Paso may retain Pacific Northwest Realty stock, Phillips Pacific stock, and the Prairie Pipeline, Prairie Transmission, and Specialty Products stock.

El Paso should reimburse New Company to the extent of $4,972,000 for El Paso's use of the tax loss carry over.

As to inter-company contracts, Pacific Western suggests reinstatement of the CIG contract and Sumas Exchange Agreement, but the latter with an option to cancel. The San Juan Gathering Agreement should be reinstated at $.04½ per MCF with any price differential determined by the Federal Power Commission to be retroactive.

The Kingsgate Exchange Agreement should be reinstated.

Gas Reserves

Pacific Western takes the position that El Paso's estimate of the gas reserves to be divested of 9.2 TCF is overestimated and that El Paso should guarantee to New Company, total reserves in the amount of 9.2 TCF, and that New Company should have an option to cancel the Sumas Exchange Agreement.

SUMMARY OF PARADOX PLAN

Paradox proposes a cash purchase of El Paso's equity. Paradox would assume $170,000,000 of El Paso's indebtedness and pay cash for the equity at book value ($61,000,000) plus an amount equal to the book value of the stock of West Coast Transmission; or, Paradox would pay cash up to $73,000,000 plus an amount equal to the book value of the stock of West Coast.

The funds would be raised through an underwriting and sale of Paradox stock to the public.

SUMMARY OF ROSENBLATT-HUSKY PLAN

Accepts the El Paso plan, with modifications.

West Coast stock should be divested to New Company for working capital, "at a value equal to the net realizable proceeds from the sale of those shares."

There should be some reimbursement for El Paso's use of PNW tax losses.

There should be three voting trustees to be designated by the Board of Directors or the Executive Committe of Rosenblatt-Husky.

SUMMARY OF WESTERN STATES' PLAN

Accepts the El Paso plan and would propose to purchase 20 percent of the common stock of New Company (less founders' shares). The funds for the purchase would be obtained through a nationwide public offering of Western States' stock.

In the alternative, Western States would acquire all of the common stock of New Company. Up to 20 percent

of the stock would be purchased for cash derived from the proceeds of a public offering of Western States' stock. The balance of 80 percent or more would be acquired by an exchange of El Paso stock for the New Company stock. The El Paso stock would be acquired by an exchange of Western States' stock for El Paso stock, the offer of exchange being made to El Paso stockholders.

Western States proposes that El Paso pledge the West Coast stock as security for an open line of credit which could be drawn upon by New Company for interim expenses. At the time of closing, this stock would be released from the pledge and sold as directed by the Court, with El Paso paying off the borrowings. Also, El Paso should stand Western States' interim expenses until the actual take-over.

With these provisions, El Paso should retain the West Coast stock and also the stock of the Northwest Production Company.

Western States does not request any reimbursement for the use of PNW tax losses.

Sumas Exchange Agreement should be reinstated with option to terminate on reasonable notice.

SUMMARY OF PLANS PROPOSED BY EDISON

In its original comments, Southern California Edison Company proposed two plans. The first proposed that the Court designate a specific purchaser from among the applicants, and that all of the assets to be divested be transferred to the successful applicant's corporation in exchange for its bonds and debentures in an amount to

be fixed by the Court and a specified percentage of the common stock of the acquiring corporation. The bonds and debentures received by El Paso would be exchanged by it for retirement of its own bonds and debentures in a manner similar to what El Paso proposes. The percentage of stock to be retained by the successful applicant should fairly reflect the effort expended, the expense incurred, and the risk taken.

The second plan is a slight variation of the El Paso plan. It would transfer the assets to New Company in exchange for New Company's common stock and an assumption of El Paso's bond and debenture indebtedness in the amount of $150,000,000 instead of $170,000,000 as proposed by El Paso. All of the stock of New Company would be deposited with a trustee. As soon as possible thereafter, the trustee would make a public offering through underwriter of 80 percent of the stock held by it, and as soon as the price for the 80 percent is established, the trustee will then sell the remaining 20 percent of the stock to the successful applicant at the net amount per share El Paso will realize from the public sale.

In its final brief, El Paso suggests that its alternate plan be modified to allow El Paso to dispose of the New Company stock as it sees fit, so long as it disposes of all the stock within a period of one year from the date of divestiture.

OTHER SUGGESTIONS OF INTERVENORS

The intervenors have made many and varied suggestions for modifications in the El Paso plan and suggestions for the Court's consideration in devising a

plan for divestiture. Time does not permit nor would any good purpose be served by a discussion of them. They have been considered by the Court and, together with the evidence, constitute the basis for the Court's determination.

PROPERTY TO BE DIVESTED

El Paso proposes to divest to New Company the following:

Physical Assets

The property plant and equipment described in El Paso Exhibit 18 and 22 together with any additions, modifications, or replacements thereof subsequent to August 4, 1967.

Gas Sales Agreement

All gas sales contracts with any customer connected to any of the facilities to be divested to New Company existing at the effective date of the divestment.

Investments

(See Appendix for further detail.)

1. 49 percent of the capital stock of Phillips Pacific Chemical Co., which owns a fertilizer plant near Hedges, Washington;
2. All of the capital stock of Pacific Northwest Realty Corporation which owns an office building in Salt Lake City, Utah;
3. Inactive subsidiaries acquired from Pacific Northwest as a result of the merger:
   Prairie Pipeline Ltd.
   Prairie Transmission Lines Ltd.
   Specialty Gas Products

The total investment in these companies is $61,000.

4. Miscellaneous club memberships representing an investment of $7,000.

These proposals have met with no objection. The Court finds that these physical assets and gas sales agreements are essential to the service of the northwest division and should be divested to New Company. The investments above described were acquired as a result of the merger, will in total contribute to the welfare of New Company, and should be divested to it.

Gas Reserves

El Paso, in its plan of divestiture, proposes to divest to New Company, all reserves now held by El Paso in the San Juan Basin and elsewhere as a result of the acquisition of Pacific Northwest stock, all contracts negotiated since January 1, 1957, for Canadian gas, and all other gas supplies located north of the San Juan Basin (Ignacio, Colorado), and a portion of the San Juan reserves acquired since the acquisition of PNW by El Paso.

After deducting the gas produced since January 1, 1957, to serve the northwest division markets, the gas reserves to be divested to New Company as of January 1, 1967, are estimated by El Paso to be approximately 9.2 TCF.

At Tabs 5 and 6 of El Paso's Exhibit 1, is El Paso's summary of the dedicated reserves to be divested and a comparison of remaining reserves, percentages, and reserve life indexes for divested company and El Paso. Tabs 5 and 6 are set forth on the following page:

TAB 5

SUMMARY OF DEDICATED RESERVES TO BE DIVESTED

(Gas Volumes in M³cf at 14.73 psia Preasure Base and 60° F.)

Source Field and Reservoir	*1-1-67 Pipeline Gas Reserves*
CANADIAN	
West Coast Transmission-Sumas	2,667.9
West Coast Transmission-Kingsgate	765.0
	3,432.9
ROCKY MOUNTAIN AREA	
Big Piney Fields	
Big Piney (Almy-Mesaverde)	138.9
Big Piney (Frontier-Muddy)	2,153.2
	2,292.1
Piceance (Douglas Creek — Wasatch "A" & "G")	196.2
Miscellaneous Fields	128.6
	2,616.9
SAN JUAN AREA	
Basin Dakota Field	1,053.7
Basin Pictured Cliffs Field	396.2
Blanco Mesaverde Field	1,752.1
Miscellaneous Fields	4.6
	3,206.6
TOTAL —	9,256.4

TAB 6

COMPARISON OF REMAINING RESERVES, PERCENTAGES AND RESERVE LIFE INDEXES FOR DIVESTED COMPANY AND EL PASO

(Gas Volumes at 14.73 psia and 60° F.)

	PNW or Divested Company	*EPNG*	*Total*
January 1, 1957			
San Juan Reserves, bcf	2,591	9,539	12,130
Per Cent	21.4	78.6	100.0
Total System Reserves, bcf	6,054	27,281	33,335
Per Cent	18.2	81.8	100.0
1956 Production, bcf	....	856	
Reserve Life Index, Years	....	31.9	
January 1, 1967			
San Juan Reserves, bcf	3,207	11,509	14,716
Per Cent	21.8	78.2	100.0
Total System Reserves, bcf	9,256	30,165	39,421
Per Cent	23.5	76.5	100.0
1966 Requirement, bcf	343	1,268	
Reserve Life Index, Years	27.0	23.8	
Deliverability Life, Years	12	10	

A detailed description of the reserve acreage and gas supply data is set forth in El Paso Exhibits 23 and 24.

The primary controversy regarding the division of the gas reserves relates to the validity of El Paso's estimate of the reserves proposed to be divested to New Company in the Big Piney fields (principally Frontier-

Muddy) and in the Blanco-Mesaverde, Basin Pictured Cliffs, and Basin Dakota fields of the San Juan Basin. It is to this controversy that the Court's Findings of Fact are first directed.

The reserves in the Big Piney field and the San Juan Basin consists of both developed and undeveloped reserves, and there is no way of being absolutely certain of how much gas can be produced and recovered from these various fields in advance of the time that the gas is actually produced in its entirety. However, the gas industry recognizes certain methods and techniques by which estimates are made which are used by industry and regulatory commissions such as the Federal Power Commission.

Two basic methods are recognized. One is the performance method, often referred to as pressure performance or the pressure decline method. In order to use the performance method, it is necessary to have pressure data and cumulative gas production records over a period of time from a substantial number of wells. Having this information, reservoir engineers can make an estimate of the recoverable gas in a particular gas reservoir.

The other method is known as the volumetric or pore volume method. This method is designed to calculate the porous space within a gas reservoir which contains recoverable gas. By the drilling of wells, analysis of the cores, use of electric logs and other techniques, the thickness, porosity, water content, gas pressure, temperature, and production limits of the formation are determined and with this information and by the use of recognized techniques, the amount of recoverable reserves is computed.

The volumetric method of estimating gas reserves is used when there is not sufficient performance data to justify the use of the performance method, but there is a sharp difference of opinion among the experts as to the number of years of performance data required to justify the use of the performance method in preference to the volumetric method.

In this case, the reserve experts who testified used one or both of these methods as well as their own refinements or modifications of the performance method. It is clear from the evidence that whatever the method or methods used by the experts who testified, the judgment of the expert plays an important part in the appraisal of the available data and in arriving at an estimate of recoverable gas reserves.

In addition to El Paso, Aspen, Colonial, Colorado Interstate, Pacific Western, Rosenblatt-Husky, and Western States made estimates of the gas reserves in the Frontier-Muddy in the Big Piney and the Mesaverde, Pictured Cliffs, and Basin Dakota fields in the San Juan Basin. The experts who made these estimates testified concerning them and the methods by which they arrived at their estimates.

The estimates of the various experts are at variance not only with El Paso's estimate, but also with each other, and the Court can discern no thread of consistency by which the Court can reconcile these variations.

To illustrate the size and nature of the variations, there is set forth the reserve estimates of El Paso, Aspen, Colonial, Colorado Interstate, Pacific Western, Rosenblatt-Husky, and Western States in the San Juan Basin and the Frontier-Muddy of the Big Piney.

	E. P. Exh. 23	Aspen Exh. 6 Gruy	Colonial Exh. 24 Sipes, Bailey & Williamson	C.I.G. Exh. 10 Van Horn	Pacific Western, Exh. 21 Harlan	Rosenblatt-Husky Exh. 4 Tab 13	Western States, Exh. 14 Culver
MESA VERDE	1,752.1	1,162.4	1,544.1	1,664.5	1,246.8	1,400.0	1,777.6
PICTURED CLIFFS	396.2	311.9	344.9	396.2	170.4	396.0	496.9
BASIN DAKOTA	1,053.7	1,001.3	497.0	737.6	606.7	951.0	895.
FRONTIER-MUDDY	2,133.2	405.3	1,897.7	1,399.6	1,403.9	1,726.0	2,153.2
TOTAL DIVESTITURE	9,256.4	6,752.5	8,184.9	8,099.1	7,329.0	8,374.2	9,222.

To add to this disparity, Mr. Grandall, testifying on behalf of Paradox, stated that El Paso had underestimated rather than overestimated the Pictured Cliffs and Mesaverde reserves by 38 percent. This estimate was used by Paradox to substantiate is contention that at the time of the stock acquisition on January 1, 1957, PNW had 28.6 percent of the San Juan reserves rather than 21.4 percent asserted by El Paso.

The producing formations in the Frontier-Muddy and San Juan Basin are "tight" formations, and the percentage of gas recovery and the rate of recovery is considerably less than in more porous formations. These factors complicate the estimate of reserves and have resulted in overestimates of reserves computed by use of the volumetric method. For example, El Paso's estimates by the volumetric method of the reserves of the Mesaverde and Pictured Cliffs formation at the time of the stock acquisition were later reduced by 30 to 40 percent after sufficient performance data had been obtained to use the performance method of estimation.

The Court finds that El Paso reserve studies and the data upon which the studies are based was assembled over many years of operation and is the same data used by El Paso in estimating reserves in the ordinary course of its business and in proceedings before the Federal Power Commission. The data upon which the estimate was made and the methods of evaluation have been consistently applied by El Paso in estimating both the reserves to be divested and those to be retained. Nevertheless, the Court finds that with present methods of production, the reserves proposed to be divested in the Frontier-Muddy of the Big Piney and in the San

Juan Basin will not produce recoverable gas in the quantities estimated. The greater part of the deficiency is in the estimate of the Basin Dakota reserves and results from El Paso's use of the volumetric method. The Basin Dakota was developed in recent years and its performance data is accordingly limited. The use of the volumetirc method cannot be said to be unjustified; but if the Basin Dakota reserves proposed to be divested are overestimated, then also the Basin Dakota reserves retained by El Paso are overestimated in the same proportion, for the same data and the same methods were used in estimating both.

The principal variance in the reserve estimates in the Mesaverde and Pictured Cliffs fields relates to the undeveloped reserves; but the magnitude of the difference between most of the experts is not sufficient to affect the application of either of the Cascade guidelines relating to reserves.

Because of the lack of sufficient performance data in the Frontier-Muddy, El Paso used a combination of the performance and volumetric methods to make the reserve estimates, and it may be that these reserves are overestimated because of insufficient performance data. However, these reserves were obtained from PNW as a result of the merger. If El Paso's estimate is high, it means that the field has always contained less reserves than previously estimated; and to that extent, PNW had a smaller percentage of the total reserves of the two systems at the time of the merger. In other words, if the Frontier-Muddy reserves have been overestimated, it would reduce El Paso's estimate of the total reserves, but it would not change the percentage relationship be-

tween what El Paso acquired in the Big Piney by virtue of the merger and what it is divesting.

Although it is not possible to ascertain with accuracy the total recoverable gas in the reserves which El Paso proposes to divest to New Company, the Court can determine from the evidence whether or not El Paso's proposal meets the Cascade tests which are here repeated:

(a) The reserves granted new company must be no less in relation to present existing reserves than PNW had when it was independent; and,

(b) the new reserves developed since the merger must be equitably divided between El Paso and new company.

Assuming that each estimate of the reserves which El Paso proposes to divest is accurate, if the Basin Dakota reserves retained by El Paso are reduced by the same proportion as the expert witnesses reduced New Company's Basin Dakota reserves, but the retained Pictured Cliffs and Mesaverde reserves are not reduced, New Company will receive a greater proportion of the total system reserves than PNW had on January 1, 1957, and as great or a greater proportion of the San Juan reserves than PNW had on January 1, 1957, with two minor exceptions. (See El Paso Exhibit 108.) Colonial's estimate of PNW's share of the San Juan reserves on January 1, 1957, is 20.4 percent versus 20.1 percent on January 1, 1967, and Pacific Western's estimate is 17.2 percent on January 1, 1957, versus 16.9 percent on January 1, 1967. A summary of this portion of El Paso Exhibit 108 is set forth in tabulated form on the following page.

	New Company	Aspen	Colonial	CIG	PW	R-H	WS
1-1-57							
San Juan (%)	21.4	17.2	20.4	21.2	17.2	19.3	22.0
Total System (%)	18.2	14.7	17.5	17.3	15.8	16.6	18.4
1-1-67							
San Juan (%)	21.8	18.0	20.1	21.3	16.9	19.8	22.4
Total System (%)	23.5	18.4	22.5	21.8	20.4	21.7	23.7

The Court finds that the gas reserves proposed to be divested to New Company by El Paso are no less in relation to present existing reserves than PNW had when it was independent, and that El Paso's proposal satisfies that guideline of Cascade.

We now consider the second requirement of Cascade, that there be an equitable division of the reserves developed since the merger.

The reserves developed since the stock acquisition are set forth in El Paso Exhibit 61(d) on an annual basis together with the annual production from the total reserves. On the basis of El Paso's reserve estimates, New Company will receive over 50% of the net additions to the reserves (new reserves minus production) developed since the stock acquistion. Essentially the same result is reached if the other reserve estimates in evidence are used and adjusted for a reduction of El Paso's *retained* Basin Dakota reserves in the same proportion as the reserve estimates reduced El Paso's estimates of the Basin Dakota reserves to be *divested*. (El Paso Exhibit 108.) Using the reserve estimates of Aspen, et al, so adjusted, New Company will receive from 45 percent (Aspen) to 60 percent (Colonial) of the net additions to the reserves since the stock acquisition. If a computa-

tion were made as of the date of the merger, the proportion of the net addition to reserves divested to New Company would probably be higher.

If an equitable division of the reserves developed after the merger or the stock acquisition is to be measured by the division of net additions to reserves, El Paso's proposal would be fair and equitable. Although the net addition to reserves divested and retained is a factor for the Court's consideration, the Court finds that it is neither the sole nor principal criteria for an equitable division.

If the division of the reserves is to be measured by the requirements of New Company to serve the northwest division and to supply a project by which New Company would compete in the California market, the Court finds, and it is admitted by most of the parties in interest if not all of them, that the present total system reserves by any estimate in evidence are not sufficient to meet those requirements of New Company and the requirements of the southern division. To divest to New Company reserves to meet the above requirements would necessarily require the invasion of reserves which are dedicated to the service of the southern division. So also would a reserve guarantee by El Paso of 9.2 TCF invade reserves dedicated to the service of the southern division, if El Paso's reserve estimates are too high.

The Court finds that such an invasion would not be equitable and particularly so since the invasion of reserves dedicated to the service of the southern division is not necessary to place New Company in a position where it can compete in the California market.

For New Company and El Paso to be competitors for future increments to the California market will require that both seek new reserves. The evidence discloses two areas of promise available to New Company — Canada and the Rocky Mountain area. West Coast Transmission Company has indicated its willingness to supply 400,000 MCF per day to New Company. (El Paso Exhibit 44.) There is evidence of gas availability to New Company in gas fields in the Rocky Mountain area if a market is established.

The government-industry experiments with the use of nuclear energy to increase gas recovery from tight formations by explosions in the well bore (gas buggy) offers at least some hope of increasing the recoverable gas in the domestic reserves to be divested to New Company and retained by El Paso.

The Court is satisfied that capable management of New Company can obtain the reserves necessary to compete in the California market without invading the reserves dedicated to the service of the southern division.

Although total reserves are important, one of the best and most important measures of an adequate gas supply is the length of time it will deliver into the pipeline the full requirements of the system. This is known in the industry as "deliverability life." El Paso estimates that under its proposed divestment of gas reserves, that New Company will have a 12-year deliverability life and that the reserves retained by El Paso will give it a 10-year deliverability life.

Aspen's estimtaes show a deliverability life of five years for New Company, (Aspen's Exhibits 7 and 8)

but Mr. Gruy, Aspen's expert, testified the defiiciencies are not great for the first ten years, and that overall El Paso's proposal was fair and equitable.

Colonial's Exhibit 25 shows an 11-year deliverability life.

Colorado Interstate's Exhibit 11 shows a deliverability life of three years, but the deficiencies are small until the year 1974. Colorado Interstate's Exhibit 12 shows an annual availability or deliverability life for New Company of ten years with Colorado Interstate's proposed modification of the Sumas Exchange Agreement.

Pacific Western's Exhibit 21, page 2, shows New Company's deliverability life as ten years.

Rosenblatt-Husky's Exhibit 4, Tab 14, shows for all practical purposes, a deliverability life of seven years for New Company.

Western States' Exhibit 14, page 2, estimates New Company's deliverability life as eleven years.

Although this evidence is to some extent conflicting, the Court finds that under El Paso's proposal, New Company will have a deliverability life of at least ten years from January 1, 1967; that its deliverability life will at least equal El Paso's deliverability life after divestiture; that New Company's deliverability life of ten years is equal to the national average pipeline deliverability; that under El Paso's proposal, New Company will have a reserve life index of not less than 20 years nor more than 27 years; that this is in excess of the national average which is 16 years and will be at least equal to El Paso's reserve life index upon divestiture.

Under the El Paso plan, El Paso proposes the reinstatement of the Sumas Exchange Agreement, which would require New Company to sell to El Paso from its San Juan Basin reserves, 100,000 MCF per day. Although New Company would be reimbursed by El Paso at the rate of $.25 per MCF, nevertheless, the effect of the reinstatement of the Sumas Exchange Agreement will be that New Company will not be able to utilize 100,000 MCF per day of the reserves divested to it either in the service of the northwest division or as a nucleus of a supply to compete in the California market.

The Court finds that the division of the gas reserves as proposed by El Paso is fair and equitable if the divestiture is freed from obligation to continue to supply gas to El Paso under the Sumas Exchange Agreement. However, since this 100,000 MCF per day constitutes a part of the reserves supplying the southern division, it would be inequitable to deprive El Paso of that gas without reasonable notice. The Court determines that a period of one year is a reasonable time for El Paso to replace the Sumas Exchange Agreement gas with other reserves and that El Paso after June 30, 1969, shall be entitled to no gas supplies by virtue of the Sumas Exchange Agreement.

We have not overlooked the Government's suggestion that not only should the Sumas Exchange Agreement not be reinstated, but that El Paso should divest an additional 100,000 MCF per day from El Paso's reserves in the San Juan Basin or the Permian Basin. The Government recognizes that this proposal would divert to the New Company, gas reserves presently dedicated to the southern division. The Government, how-

ever, justifies this invasion of the southern division reserves on the ground that El Paso could replace these reserves in the Permian Basin without paying a higher price, and also because El Paso has demonstrated an ability to acquire large quantities of reserves within short periods of time when necessary. The Court has carefully considered the Government's suggestion, but does not accept it for the principal reason that it would be inequitable to invade reserves which are dedicated to the service of the southern division, in view of the Court's finding that the management selected by the Court for New Company is capable of obtaining for itself gas reserves to support its competition in the California market.

CASCADE GUIDELINES AND QUESTIONS FOR DETERMINATION

Any plan of divestiture necessarily requires a determination of:

1. What is to be divested;
2. To whom it is to be divested;
3. How it is to be divested.

These determinations must result in a New Company being at once being restored to a position where it can compete with El Paso in the California market.

The Cascade guidelines in making these determinations are:

> "(1) Gas Reserves."
>
> "The gas reserves granted to New Company must be no less in relation to present existing reserves than Pacific Northwest had when it was independent; and the new gas reserves developed

since the merger must be equitably divided between El Paso and the New Company.

"(2) Financial Aspects."

a. "Consider the disposition of the West Coast Transmission stock in the light of the New Company's need for working capital necessary to restore the competitive balance that the merger destroyed.

b. "Consider reimbursement of New Company by El Paso for the use by El Paso of the tax losses of Pacific Northwest.

"(3) Control of El Paso."

"To insulate New Company from El Paso control, the plan should:

a. Ensure swift severance of the illegal combination and make sure New Company stock does not end up controlled by El Paso interests.

b. Require disposition of all of the stock of New Company held by El Paso with all convenient speed.

c. Impose conditions to make sure that El Paso interests do not acquire a controlling interest in New Company.

d. Consider the prospects of an outright purchase of the assets of New Company or its stock by outside interests as a means to accomplish insulation of New Company from control by El Paso interests."

A plan which will comply with the foregoing requirements and which will best accomplish the objective sought, must of necessity be tailored to some extent to fit the successful applicant.

For reasons which will later appear, the Court has selected Colorado Interstate Gas Company (CIG) as the successful applicant, and the plan adopted is one which

in the Court's opinion is best suited to enable that successful applicant to accomplish the objectives sought by the divestiture. This plan may not be suitable for other applicants.

If, for any reason, final divestiture should not be made to CIG, a different plan may be adopted. For that and other reasons, the Court retains jurisdiction to alter, amend, modify, and supplement the plan and these findings and conclusions until a final decree of divestiture is entered.

Where findings of fact and explanatory material will interrupt the continuity of the discussion of the plan and the reasons for its adoption, they are contained in an Appendix which is attached and made a part hereof by reference.

DISPOSITION OF WEST COAST AND NORTHWEST PRODUCTION COMPANY STOCK

(See Appendix for background and detail.)

Cascade states:

> "It is also earnestly argued that the New Company will sorely need the valuable and fairly liquid stock of West Coast Transmission if it is to have the working capital necessary to restore the competitive balance that the merger destroyed."

The Court finds that some of the applicants would need either the stock of the West Coast Transmission Company or the funds derived from its sale divested to New Company in order that New Company may have the working capital necessary to restore the competitive balance that the merger destroyed.

However, the Court finds that the successful applicant selected by the Court does not need nor does it want the West Coast Transmission stock or the funds derived from its sale, and that it is ready, willing, and able to supply all working capital required to restore the competitive balance.

Both West Coast and Northwest Production supply gas to the Northwest division and for this reason, if for no other, divestment by El Paso should be required. Since the stock of these companies is a non-utility asset and does not form a part of the rate base, there is no compelling reason that New Company acquire it.

In the event of the final certification of the successful applicant, these stocks should be divested by El Paso by sale to persons satisfactory to the Court and the sale accomplished as soon as practical after final certification.

TAX LOSS CARRY-FORWARD

Cascade states:

> "It is also pointed out that some $53,000,000 of taxable loses which Pacific Northwest had were utilized by El Paso during the years following the ill-starred merger. It is argued that since these tax loss carry overs were in a real sense an asset of Pacific Northwest utilized by El Paso, the New Company should receive other assets or a reduction in debt of equivalent value. These allegations, if proven, require remuneration of some kind to the New Company; for it must be a viable healthy unit, as able to compete as Pacific Northwest was when it was acquired by El Paso."

The facts concerning the utilization of the tax losses of Pacific Northwest, for the most part, are not in dispute.

Prior to the merger on December 31, 1959, Pacific Northwest had failed to generate earnings and had accumulated tax losses of $23,000,00 of which $9,000,000 was generated in 1955. The tax losses generated in any year could be carried forward for five years, but if not utilized within the five-year period, were lost.

In 1959, PNW generated additional tax losses in excess of $3,000,000, and it appeared the $9,000,000 of tax loss for the year 1955 was about to be lost. By virtue of the merger on December 31, 1959, the merged companies were able to utilize the $9,000,000 tax loss which otherwise could not have been utilized.

The tax losses generated by Pacific Northwest for the years 1955 to 1959 were approximately $53,000,000, a part of which was due to the taking of accelerated depreciation. These tax losses were of no value to Pacific Northwest during those years because it had no taxable earnings to which these previous losses could be applied, although it is possible that PNW would have generated some income in later years whereby some portion of the loss could have been used before the five-year limitation expired.

The tax loss was of value to El Paso because it was in a position to generate taxable earnings against which the losses could be applied and its taxes reduced. By utilizing the tax losses, El Paso's cash flow was increased and thereby El Paso was able to and did maintain lower rates in the northwest division than otherwise would have been possible. The lower rates resulted in an increased load which was necessary to change the northwest division from a loss to a profitable operation. Al-

though the tax savings were at least in great measure flowed through to the customer in the northwest division by these low rates, El Paso also benefited by the conversion of the northwest division from a loss to a profit operation.

The tax savings realized by use of accelerated depreciation was the subject of a show cause order and a proceeding before the Federal Power Commission in 1966. It was disposed of on an informal basis with the agreement of the customers in the northwest division and resulted in placing in a reserve account, the sum of $19,945,000 (Tab 1 of El Paso Exhibit 1) which is amortized over a 13-year period at the rate of 7½ percent a year and charged to income. This has the effect of reducing rates in the northwest division by the amount of the annual amortization. This reserve account is an obligation which will presumably be taken into account in fixing the amount of reimbursement El Paso will receive. Similarly, if El Paso should be required to reimburse New Company for the use of the tax losses, this would increase the value of New Company assets to be paid for by the successful applicant. The successful applicant does not need any such reimbursement for working capital or other purposes and does not wish any reimbursement be made. The Court finds that remuneration by El Paso is not required to make New Company a strong, viable, and healthy company, and that reimbursement would not materially add to New Company's ability to compete in the California market.

MOBIL NOTES

At the time of the merger, there was in existence between PNW and Mobil, a contract relating to the development of the Piceance Creek field. Upon the merger, El Paso assumed the obligations of PNW under this contract and now proposes to divest the contract to New Company, subject to the remaining obligations thereunder.

In essence, the contract required PNW to advance 90 percent of Mobil's cost of drilling the wells in return for which PNW obtained the gas produced at less than the prevailing price.

The remaining amount due Mobil is approximately $500,000, but the quantity of gas which is still deliverable at the reduced rate would result in a savings of over $1,000,000.

The Court finds that this contract will be beneficial to the New Company, and that this contract should be divested to New Company and New Company should assume the obligations of the contract remaining at the time the divestiture is made.

INTER-COMPANY AND MISCELLANEOUS CONTRACTS

The testimony refers to various agreements, which are summarized below with the Court's determination of their disposition.

SUMAS EXCHANGE AGREEMENT

(See Appendix for the details of its negotiation.)

This agreement was entered into between PNW and El Paso August 23, 1955. The effect of the agreement is that El Paso agreed to purchase 100,000 MCF per day from PNW in the San Juan Basin for $.25 per MCF for a period of twenty years.

El Paso proposes to reinstate the agreement. The Court, in dealing with the division of ~~gas reserves,~~ has determined it should be reinstated, but should terminate on June 20, 1969.

COLORADO INTERSTATE, PACIFIC NORTHWEST, & EL PASO CONTRACT

Pacific Northwest and Colorado Interstate had entered into a contract providing that beginning in the fall of 1956, Pacific Northwest would sell a certain quantity of gas to Colorado Interstate for delivery near Rock Springs, Wyoming, for Colorado Interstate's line which was then under construction and which would meet Pacific Northwest's line. Colorado Interstate was unable to complete its line to that point, and consequently Pacific Northwest was unable to make delivery and CIG was unable to receive the gas. CIG intended to raise the defense of force majeure. This contract was Pacific Northwest's largest sale and was important to its economic health.

As a result, Pacific Northwest, Colorado Interstate, and El Paso entered into an agreement providing:

1. Colorado Interstate would pay to Pacific Northwest the full price for the gas it con-

tracted to purchase; but Colorado Interstate would take delivery of the gas from Pacific Northwest at Ignacio, Colorado, in the San Juan Basin.

2. El Paso agreed to buy this gas from CIG, taking delivery from CIG at Ignacio.

3. Colorado Interstate agreed that at a time in the future, it would buy back from El Paso, the gas El Paso had purchased from CIG, deliver the gas to CIG at El Paso's Station 6 near Rock Springs, Wyoming. Pacific Northwest agreed to transport the gas from the San Juan Basin to that delivery point free of charge because Pacific Northwest had already been paid by Colorado Interstate for the cost of transportation.

Since the merger of El Paso and Pacific Northwest, Colorado Interstate has bought back all but 6 BCF of gas with El Paso making the delivery at Colorado Interstate's Station 6 without transportation charge.

Subject to the approval of the Federal Power Commission, this contract should continue in force and effect until completed, and New Company should assume El Paso's obligations to deliver the gas to CIG without charge for transportation.

100-100-100-60-40 CONTRACT

Reference has been made in the testimony to this contract. This was an agreement dated August 2, 1956, entered into between PNW and El Paso. It resulted from the fact that PNW did not have adequate gas supplies and was not in a position to raise sufficient funds to drill the wells on its San Juan acreage which were necessary to give PNW the needed supplies. El Paso

agreed that it would sell to PNW, 100,000 MCF per day for three years, 60,000 MCF per day during the fourth year, and 40,000 MCF per day for the fifth year. The gas was to be delivered to PNW in the San Juan Basin. Two years after the above deliveries were completed, PNW was to begin to sell the same quantity of gas back to El Paso.

Fifty-six BCF of gas was delivered to PNW under this contract prior to the merger. After the merger, there were no further deliveries made under this contract.

The Court finds no reason to reinstate this agreement.

KINGSGATE EXCHANGE

On May 25, 1957, El Paso concluded negotiations on behalf of PNW which was then El Paso's wholly-owned subsidiary, with West Coast Transmission Company for 150,000 MCF of gas per day to be delivered at the international boundary at Kingsgate, British Columbia. Both the Federal Power Commission and the Canadian National Energy Board expressed concern that PNW would be unable to take that volume into its system in view of its market requirements. To provide assurance that its subsidiary would be able to meet its contract, El Paso offered to enter into a contract with PNW to take such volumes of the gas imported at Kingsgate as PNW might find itself unable to digest. This agreement was never executed because PNW was merged into El Paso before the gas began to flow.

El Paso does not propose to enter into a similar agreement with New Company because New Company will need the full yearly volumes of gas it is entitled to import at Kingsgate to serve its expanded markets.

The Court finds the agreement was never consummated, and there is no reason for New Company to enter into such an agreement at this time.

SAN JUAN GAS GATHERING AGREEMENT

Prior to the merger, PNW and El Paso had entered into a mutual gas gathering in the San Juan Basin under a contract which is in evidence as El Paso Exhibit 4. That contract covered only 126 wells producing gas from one formation in a limited area.

Whether or not New Company and El Paso should enter into a mutual gas gathering agreement is a matter for negotiation by the parties, subject to scrutiny and approval or disapproval by the Federal Power Commission.

JACKSON PRAIRIE FIELD STORAGE PROJECT

This project is also known as the Chehalis Gas Storage Project.

This is a test storage project in which Washington Natural Gas Company, Washington Water Power Company, and El Paso each own one-third interest. The project is on leased land, a short distance from Seattle, Washington. It is a test project and differs somewhat from most gas storage projects in that the gas is being injected into a waterbearing sand or aquifer. It is estimated that it will have a total capacity of 20 BCF.

The project is still under development and testing, and as of December 1, 1967, 5-2/10 BCF of gas has been stored. So far there is no evidence of leaking.

The project represents an investment to date of approximately $7,000,000 by the three companies.

El Paso proposes to divest to New Company its one-third interest in this project.

The Court finds that it would be to the best interests of New Company that El Paso divest its one-third interest in this project to New Company, and that New Company assume El Paso's obligation in connection with the development and operation of the project as conceived by the three parties.

TO WHOM ARE THE ASSETS TO BE DIVESTED

There are actually two questions to be determined. First, what is the identity of the New Company to which the divested assets will be transferred, and what applicant should be selected to acquire the management and control of that entity?

The Court finds that New Company may obtain tax advantages if the corporate entity to receive the divested assets is "Northwest Pipeline Corporation," a Delaware corporation which El Paso caused to be incorporated in 1965, and the Court finds nothing in the evidence which would indicate any reason why this corporate entity should not be utilized. However, we will continue to refer to that entity as "New Company."

The Court has already indicated its selection of the successful applicant and here sets forth its reasons for that selection.

The selection of the successful applicant involves the preliminary question of whether the Court should select the applicant which, in the Court's opinion, is best qualified to carry out the mandate that " - - - a new company be at once restored to a position where it could compete with El Paso in the California market," or (as El Paso contends) should the Court select all applicants which the Court finds are qualified to accomplish the objectives sought and instruct El Paso to negotiate " - - - a binding agreement - - - with each of the qualified applicants, and following presentation of the agreements to the Court, select the successful applicant." (page 41, El Paso Brief.) The successful applicant which the Court would select, in El Paso's view, would be the one offering the highest price.

The Court finds, as do most of the intervenors, that all of the applicants are not equally qualified to make New Company a competitive factor in the California market. The Court also finds that of those applicants who are so qualified, all do not have the capability of furnishing the same degree of competition. The Court conceives its duty to be to select not only an applicant qualified to make New Company a competitive factor, but the applicant which in the Court's opinion can and will furnish through New Company, the greatest degree of competition and the greatest impact on the California market.

To select less than the strongest and best qualified applicant, gives to El Paso an unwarranted advantage in the competitive race for the California market, and particularly so when in the Court's opinion, New Company will be confronted with a much more formidable

task in becoming such a competitive factor than was PNW for reasons which follow.

COMPETITION 1967 vs. 1957

In 1957, the only California market for an out-of-state gas supplier were the natural gas distributors in California consisting of Pacific Gas and Electric Company in the north and the southern companies in the south, together with Edison and perhaps some other large gas consumers. In 1967, the market for the out-of-state supplier remains the same. In other words, although the consumption of gas in the state of California has expanded at a rapid rate since 1957 and still continues to expand, the possible purchasers from out-of-state suppliers has not expanded in numbers and the competition to supply this limited number of purchasers is more intense.

In 1957, El Paso was the only out-of-state supplier of gas to the California market. In 1967, there were three interstate pipelines supplying out-of-state gas to the California market: El Paso and Transwestern (recently acquired by Texas Eastern) serving the southern California distributors and Pacific Gas and Transmission Company, controlled by PG & E, which transports Canadian gas to California to supply the needs of PG & E. Consequently, New Company will be faced with two entrenched competitors in the south instead of one and confronted with the fact that the principal market in the north, PG & E, has its own out-of-state supplier in PG & T.

That El Paso is a stronger competitor today than in 1957 is indicated by the growth of its gross revenues

from gas sales from $198,000,000 in 1957 to an estimated $370,000,000 in 1968, and an increase in its gross utility plant since 1956 of over $700,000,000. (El Paso Exhibit 111.)

The New Company's other competitor in the south, Transwestern and its parent, Texas Eastern, for the year 1966 ranked first in the nation in terms of total gas sales revenues which were in excess of $390,000,000.

In comparison to its competition, New Company's 1968 gross revenues from gas sales are estimated at $118,800,000. (El Paso Exhibit 1, Tab 10.)

Although this competition is formidable, the evidence indicates that it is not impregnable. The southern companies state that their incremental market requirements are sufficient to support a pipeline to California by 1970, and they welcome competition. Edison is seeking an out-of-state supplier.

Although the expanding California market appears to offer opportunities for New Company to enter the market, the recommendation of the Federal Power Commission staff that a 42-inch pipeline should be constructed to California is a matter of grave concern, for according to the evidence before the Court, a 42-inch line would serve all increments to the southern California market for the forseeable future. The Supreme Court recognized that competition in the California market is limited to future increments, which have not yet been certificated for service. Once an increment has been certificated, it is withdrawn from competition. The recommendations of the Commission's staff for the construction of a 42-inch line have been commended by the

FPC examiner in a current proceeding as "bold and constructive." The Government in its Brief at page 9 states:

> "It is clear that the 42-inch concept is gaining ground; it has already been accorded a respectful reception in the FPC's Order of March 5, 1968. (California-Edison Motion, page 4.)"

The Government at the same page of its Brief also states:

> "It is too early to predict the ultimate direction or final outcome of this current FPC proceeding. The opportunity it presents to the new company which is to emerge from this law suit is evident. If a full scale 42-inch proceeding gets underway, either in this current FPC case or in some later one, the new company should be equipped to enter as a contender with at least the minimum qualifications for serious consideration."

The Court agrees and adds that for New Company to be a serious competitor for a prize of that magnitude will require the most experienced management and the strongest financial backing which is available to it, and it is imperative that the strongest applicant and the one best qualified to make New Company a serious competitor in these circumstances be selected as the successful applicant.

SELECTION OF THE SUCCESSFUL APPLICANT

The Court here sets forth its reasons for selecting CIG as the successful applicant.

CIG has been engaged in the operation of a natural gas transmission system along the eastern slope of the Rocky Mountains since 1928. Its system is presently

physically connected with that of the New Company near Green River, Wyoming. Although other applicants for acquisition have in their organization men with experience in the natural gas transmission business, none of the applicants with the exception of Paradox, have had any history of operations in this field, and Paradox is not so engaged at the present time.

CIG is the only applicant which has a presently functioning organization with experienced management and personnel which gives it the capability to restore New Company to a competitive position in a much shorter period of time than could be done by any other applicant. Because of the present competitive situation, time is of the essence.

It has had a wealth of experience in proceedings before the Federal Power Commission; it is financially able to supply all working capital needed by New Company, and its financial strength will assure the financial ability of New Company to finance an invasion of the California market if and when so authorized by the Federal Power Commission.

It has demonstrated its ability to acquire reserves for its own system in the past, which indicates its present ability to acquire for New Company, reserves to meet the expanding requirements of the northwest and to compete in the California market.

By its acquisition of all of the common stock of New Company, CIG has perhaps a greater incentive to expand to California than those applicants who would acquire a leasser interest, for it has more to gain if it is successful in gaining a foothold in this rapidly expanding market.

Edison would disqualify CIG from consideration because it did not or would not make a clear and unequivocal committment to serve Edison directly. We think this is not a prerequisite for selection. A direct sale to Edison is only one way to enter the California market and it would be a mistake, if not improper, for this Court to dictate how New Company should or should not attempt to compete.

We have again read and considered the testimony of the CIG witnesses referred to by Edison at page 64 of its Brief and find therein no statement of policy or position which would cause this Court to disqualify CIG from consideration. The witnesses did not commit CIG to serve Edison directly, but also they did not rule out the possibility of a direct sale.

SHOULD CIG BE EXCLUDED FOR COMPETITIVE REASONS?

The Government has raised the questions of whether or not CIG is now a potential competitor for the California market and "to a lesser extent" a potential competitor with New Company for Rocky Mountain reserves and for its existing customers in the Pacific Northwest.

The Government states at page 32 of its Brief:

> "We do not think, however, that CIG should be automatically excluded from consideration here because it is now a potential competitor for the California market. If the combination of CIG and the New Company were to create a considerably stronger competitor for the California market than either one could possibly be alone, the Court could validly conclude that such a combination is pro-competitive rather than anti-com-

petitive, and entirely consistent with the mandate of the Supreme Court."

The Government, in its Brief, discusses the pro's and con's of the question of whether or not CIG should be disqualified and concludes that it is a close question. The Court has given careful consideration to the evidence bearing upon these questions.

The facts to which the Government points indicating that CIG is *now* a potential competitor for the California market are:

1. Its geographical situation gives it an advantage over other major interstate pipelines, except the Pacific Northwest line with respect to the California market.
2. It is an established, experienced, conservatively financed company and would seem far better able than most companies successfully to finance a large-scale pipeline extension.
3. That CIG should be able to gain access to gas reserves needed for the California project.

Other evidence bearing on the determination of this question is the testimony of Mr. King and Mr. Pelican of CIG which is not controverted in any material respect.

This testimony is summarized in CIG's Brief at pages 68 to 85 and need not here be repeated in detail, but it shows that CIG's major markets are on the eastern slope of the Rocky Mountains, while New Company's markets are on the west side of the Continental Divide. Approximately 80 percent of CIG's gas supply is in the Anadarko Basin in Texas, Oklahoma, and Kansas, while New Company will derive its supplies principally from Canada, the San Juan Basin in New Mexico, and the Big

Piney fields in Wyoming. Presently, there is no field from which both systems are taking gas.

In Wyoming, New Company obtains supplies from the Big Piney field which is about 75 miles from the nearest point on CIG's system, and CIG obtains about 5 percent of its supply from the Desert Springs field which is also 75 miles distant from the New Company's system.

In Colorado, New Company's supplies are located west of the Continental Divide and along the western and southwestern borders of Colorado, while CIG's supply areas in Colorado lie far to the east and access is barred by the Continental Divide.

As to CIG's possible competition for New Company markets, there is no evidence that CIG has shown any interest in the Pacific Northwest, or that CIG's geographical position or its standing in the industry has had any impact on the competitive situation in that area. The major growth of markets in the Pacific Northwest are along the western portion of the New Company's system and are far removed from CIG's present line. There is no evidence that the incremental demands in the Pacific Notrhwest area are sufficient in size to support an expansion by CIG into that area. It appears that the more likely competition in the Pacific Northwest area will come from Canadian gas transported by Pacific Gas Transmission Company, West Coast, or some other company utilizing Canadian gas.

Any potential of CIG as a competitor to New Company in the northwest, in the Court's opinion, is not of sufficient magnitude to exclude CIG from consideration.

Referring now to the California market, in 1958, CIG had an excess supply of gas for which it desired to find a market. Among the attempts to dispose of it was a proposed joint venture with El Paso to take gas from the western terminus of CIG's line at Rock Springs, Wyoming, to a point on the California border. CIG was to provide 300,000 MCF per day of the 400,000 MCF needed to commence initial delivery. This has been referred to in the testimony as the Rock Springs project. The application for the project was denied by the Federal Power Commission.

Except for this one incident, there is no evidence of any attempt by CIG to become a competitor in the California market, and there is no evidence that CIG's financial strength and its geographical situation has had any impact upon or has been a factor in the competition for the California market.

From the evidence before the Court, CIG is not and since the failure of the Rock Springs project has not been a competitor for the California market, and that acting alone, its potential for being a competitor in the California market in the foreseeable future is so uncertain that it should not be grounds for the exclusion of CIG from consideration.

The Court is satisfied that CIG, standing alone, has little chance of affecting competition for the California market; but the Court is equally convinced that of the alternatives available, the combination of CIG and the New Company will create the strongest competitive potential for the California market.

For the reasons stated under the heading, "Competition 1967 vs. 1957" (supra), the Court reiterates its conviction that to restore the competition required by the Supreme Court's mandate demands the strongest competition potential available.

HOW THE PROPERTY IS TO BE DIVESTED

This part of the plan provides a method of divestment which, among other things, will accomplish the insulation of New Company and the successful applicant from El Paso control as required by Cascade.

The alternative methods or means of divestiture available to the Court are:

1. A cash sale;
2. A transfer of the divested assets to a New Company and a private or public cash sale of the stock of New Company; or,
3. A transfer of the assets in exchange for stock; or,
4. A combination of one or more of the foregoing.

Implicit in all of these alternatives is that the acquirer of the property will assume some portion of El Paso's bond and debenture indebtedness, and that the foregoing methods are the available means of disposing of the equity.

Although a sale of the assets to be divested for cash or a transfer of the assets to a New Company and the sale of all of the New Company common stock for cash would effectively accomplish the insulation of El Paso from control of the divested system, El Paso would suffer adverse tax consequences.

The Court is of the opinion that the stock exchange plan proposed by CIG will also adequately and effectively insulate New Company and the successful applicant from El Paso control, is better suited to enable CIG to proceed promptly with the steps necessary to enable it to become a competitive factor in the California market, and may avoid adverse tax consequences to El Paso.

Again the Court recognizes that this plan may not be the one best suited to a different applicant, and if for any reason a different applicant should be selected, a different plan may be established.

BASIS FOR REIMBURSEMENT

The basis for reimbursement to El Paso should be the fair market value of the equity in the assets divested at the time of divestment, determined by negotiation between the successful applicant and El Paso, and if they are unable to agree within the time allotted by the Court, the fair market value should be determined by the Court.

HOW REIMBURSEMENT WILL BE MADE

1. New Company will assume approximately $170,000,000 of El Paso's bond and debenture debt and assume the payment of the cost of the debt roll over of one-eighth of one percent increase in the interest rate. In satisfaction of this assumption, New Company will issue to holders of El Paso bonds and debentures, bonds and debentures of New Company of like tenor and effect, but with an interest rate one-eighth of one percent greater than the rate applicable to the securities of El Paso which will be surrendered and cancelled.

2. New Company will issue to El Paso, preferred stock (convertible into common stock of CIG) equivalent in amount to the fair market value of El Paso's equity. This stock may be retained by El Paso or disposed of by El Paso as it sees fit. The exact terms and conditions of the preferred stock and the provisions pertaining to conversion shall be negotiated by CIG and El Paso, and in case of failure to agree, such determinations shall be made by the Court.

3. New Company shall issue to CIG, all of the common stock of New Company in exchange for $5,000,000 in cash and common stock of CIG sufficient in value to satisfy the conversion requirements of New Company's preferred stock.

PROVISIONS FOR INSULATION FROM EL PASO CONTROL

The final decree of divestiture shall contain restrictive provisions to insulate New Company from domination or control by El Paso, its directors, officers, and stockholders, either directly or indirectly.

The restrictive provisions shall be negotiated by El Paso and CIG and submitted to the Court for its consideration. If El Paso and CIG cannot agree, the Court will formulate the provisions.

TIME OF DIVESTMENT

Final divestment shall be consummated as soon as possible after the issuance of a permanent certificate to New Company by the Federal Power Commission. In the interim period, New Company may assume control and

management of the physical plant if so authorized by a temporary certificate issued by the Federal Power Commission.

CIG shall divest itself of any El Paso stock it may own or control prior to assuming control and management of the property.

OPERATING EMPLOYEES IN THE NORTHWEST DIVISION

Those employees of El Paso who are employed in the operations of the northwest division at the time of divestment and who desire to continue their employment with the New Company should, generally speaking, be offered employment by New Company on no less favorable terms and with no less favorable benefits than their present employment provides. This is a statement of principle, and is not intended to vest in any individual employee a right to be employed by New Company. This statement of principal does not apply to those employees holding policy-making positions.

CONCLUSION

The Court is satisfied that under this plan, New Company will be a strong viable company, capable of serving the Pacific Northwest and restoring the competition in the California market which was destroyed by El Paso's acquisition of the PNW stock and the later merger of the two companies.

PROCEDURE TO IMPLEMENT PLAN

The implementation of this plan requires a step-by-step procedure. It is the Court's purpose to here point

out the steps that should be taken and the Court will enter such orders as may be necessary from time to time to carry out the procedures here set forth, or to amend, alter, or supplement these procedures as the facts and circumstances may require.

First Step:

CIG and El Paso shall immediately submit the plan herein contained to the Internal Revenue Service for a ruling on whether or not the divestiture, according to this plan, is a tax-free transaction.

Concurrently, the successful applicant and El Paso shall enter into negotiations to:

a. Determine the amount of reimbursement El Paso shall receive for its equity in the properties to be divested; or, in the alternative, a formula by which the amount may be determined at the time of divestiture;

b. Determine the terms and conditions of the preferred stock and the conversion provisions thereof; or, in the alternative, a formula by which the terms and conditions of the preferred stock may be determined as of the date of divestment;

c. Formulate restrictive provisions to insulate New Company from domination or control by El Paso, its directors, officers, and stockholders, either directly or indirectly;

d. Agree upon such other matters as El Paso and the successful applicant may deem proper.

Any and all agreements which El Paso and the successful applicant may enter into shall not become effective unless and until they are approved by the Court.

The negotiations shall be concluded within 35 days after the entry of these Finds of Fact, Conclusions of Law, and Opinion.

The Department of Justice may, if it so desires, have an observer present at all negotiations between El Paso and CIG under Step 1; and for this purpose, the Department of Justice shall be advised of the time and place of all such negotiations.

Step Two:

El Paso and CIG shall, as soon as possible, commence the preparations necessary to cause New Company to make application to the Federal Power Commission for the necessary certificate to authorize New Company to acquire and operate the divested property. To this end, El Paso shall take the necessary steps to place representatives of CIG in a position to utilize the Northwest Pipeline Company for this purpose and otherwise cooperate with CIG to the end that the applications for temporary or permanent certificates, or both, be presented to the Federal Power Commission with all possible expedition.

Insofar as possible, these preparations should proceed concurrently with the procedures under Step 1.

Step Three:

At the conclusion of the negotiations under Step 1, El Paso and CIG shall report to the Court in writing, the result of these negotiations and the ruling of the Internal Revenue Service, if such a ruling has been made at the time. A copy of this report shall be served upon

all parties in this proceeding entitled to service, including the applicants for acquisition.

If the negotiators have arrived at an agreement on reimbursement for El Paso's equity and the terms and conditions of New Company preferred stock, the Court will then enter an order setting a time within which all parties in interest may file objections to the Court's Findings of Fact, Conclusions of Law, and Opinion and the report of the negotiators and will set a time and place for hearing these objections.

If El Paso and the successful applicant have been unable to agree on the matters requiring agreement, the Court will set a time for hearing and determining the matters in controversy. At that time or some later time fixed by the Court, the Court will hear any objections of the parties in interest to the Court's Findings of Fact, Conclusions of Law, and Opinion and the Court's determination of any controverted matters.

The principal purpose of detailing the procedure is to guide counsel and preserve the appeal rights of the parties. For this latter reason, the Court declares that these Findings of Fact, Conclusions of Law, and Opinion are tentative and interlocutory in character and will remain so until after the parties in interest have had an opportunity to object to the findings and determinations of the Court, be heard thereon, and their objections ruled upon by the Court.

CIG, having been selected as the successful applicant, is now a party to these proceedings and entitled to participate the same as any other party. The unsuccessful applicants have not been and are not now considered

as parties to this proceeding, but retain their position as applicants for acquisition, and, as such, are entitled to be served with all documents as if they were parties.

The Court has purposely not provided for any procedures beyond the applications to the Federal Power Commission for certificates of authority to carry out the plan of divestiture. If further proceedings are required by this Court during the pendency of those proceedings or prior to final divestiture, the Court will establish procedures appropriate to the circumstances which require the Court's further action.

Entered by the Court this 21st day of June, 1968.

Hatfield Chilson
United States District Judge

APPENDIX

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PROCEEDINGS SINCE CASCADE

On April 18, 1967, the undersigned was assigned by the Honorable Alfred P. Murrah, Chief Judge of the Court of Appeals, Tenth Circuit, to the District of Utah to conduct the further proceedings required by Cascade.

On April 21, 1967, this Court entered an Order that a conference with counsel would be had in Salt Lake City, Utah, on June 9, 1967, to discuss procedure and a timetable to determine matters requiring resolution before proceeding with the "de novo" hearings ordered by the Supreme Court.

At the conference on June 9, the United States, El Paso, the Federal Power Commission as amicus curiae, 22 prospective intervenors, and 11 parties who were interested in acquiring the properties to be divested (referred to in these proceedings as applicants for acquisition) appeared and participated in the conference.

Following the conference, the Court vacated the previous Orders of Divestiture and ordered the following pre-hearing procedure:

1. All Motions to Intervene should be filed by June 26, 1967, and would be determined ex parte.
2. El Paso was required to file a plan or proposal for divestiture by August 4, 1967.
3. Applicants for acquisition were required to file their respective plans or proposals for acquisition by August 25, 1967.
4. The parties to these proceedings, including the intervenors, (but excluding applicants for acquisition) were given until September 18, 1967, to file comments upon the plans and proposals for divestiture.

The Court also ordered that the applicants for acquisition could appear at the hearings, produce evidence, and be heard in support of their respective plans and proposals for acquisition, and that applicants for acquisition would be subject to examination by any of the original or intervening parties on matters relating to their respective plans or proposals.

The Court granted 26 Motions to Intervene, denied all Motions to Intervene filed by applicants for acquisition, and ordered that the previous Order of the Court allowing the Federal Power Commission to appear amicus curiae should remain in force.

On September 6, 1967, the Court ordered the "de novo" hearings to commence at 10:00 a.m. on Monday, October 16, 1967, in the Federal District Court at Ogden, Utah. (The hearings were held at Ogden because the only Federal District Courtroom in Salt Lake City large enough to accommodate the large number of counsel was not available for these proceedings.)

By the same Order of September 6, 1967, the Court ordered a pre-hearing conference be held in Salt Lake City on September 28, 1967 (later changed to October 3):

1. To delineate the questions which would be the subject of the hearings and prescribe the order of their hearing and determination;
2. To determine the order of presentation of evidence and the time required for that purpose;
3. To discuss and determine any other questions of procedure.

At the conference on October 3, there was a tentative delineation of the issues and the adoption of rules of procedure.

The hearings were commenced at Ogden, Utah, on Monday, October 16, 1967.

Some intervenors failed to file Comments on the proposed plans and did not participate in the hearings.

Originally there were 12 applicants for acquisition. Two withdrew (Northwest Pipeline Corporation and Transcontinental Gas Pipeline Corporation) and Husky Oil Company joined forces with Rosenblatt, and they were thereafter referred to as Rosenblatt-Husky.

The remaining nine applicants for acquisition are:

Aspen Pipeline Company
Colonial Natural Gas Company
Colorado Interstate Gas Company
Continental Pacific Corporation
Great Lakes Carbon Corporation
Pacific Western Pipeline Corporation
Paradox Production Corporation
Rosenblatt-Husky
Western States Pipeline Corporation

The 22 intervenors who participated in the hearings are:

Arizona Corporation Commission
Arizona Public Service Company
Tucson Gas and Electric Company
State of California
Public Utilities Commission of California
Cascade Natural Gas Corporation
Public Utilities Commission of Colorado
Idaho Public Utilities Commission
Mountain Fuel Supply Company
Nevada Public Service Commission
Northwest Natural Gas Company
Oregon Public Utilities Commission
Pacific Gas and Electric Company
San Diego Gas and Electric Company
Southern California Edison Company

Southern California Gas Company
Southern Counties Gas Company of California
Southwest Gas Corporation
Utah Public Service Commission
Washington Natural Gas Company
Washington Water and Power Company
Washington Utilities & Transportation Commission

The de novo hearings were held in Ogden, Utah, from October 16, 1967, to November 15, 1967; were then recessed until January 8, 1968, at which time, by unanimous consent of the parties, the hearings were resumed in Denver, Colorado. The taking of evidence was concluded on March 21, 1968, and the following briefing schedule was ordered:

Applicants for Acquisition by April 1, 1968;

Intervenors and Federal Power Commission by April 16, 1968;

El Paso by May 1, 1968;

United States by May 10, 1968; (Extended to May 15, 1968.)

El Paso Reply to the United States Brief by May 18, 1968; (Extended to May 25, 1968.)

Oral argument was had on June 3, 1968.

CANADIAN GAS SUPPLY

Sumas #1, Sumas #2, Kingsgate

The reserves available under these three contracts have been summarized in El Paso's Exhibit 42 and is here set forth.

CANADIAN SUPPLY

From Westcoast Transmission Company, Limited

Contract Date	Term	Termination Date	Daily Volume M^2cf	Reserve 1-1-67, M^3cf
1. December 11, 1954 (First Sumas), attached as Item 1.	20 years	1977	300	1,191.0
2. February 28, 1966 (Second Sumas), attached as Item 2; as Supplemented October 6, 1967, Supplement attached as Item 2S.[1]	20 years	1987	200	1,476.9
3. September 23, 1960 (Kingsgate), attached as Item 3.	20 years	1981	150	765.0
				3,432.9

[1] Note: The Second Sumas, dated February 28, 1966, was filled with the FPC in Docket CP66-315. This contract provided for the following volumes on a minimum 75% load factor:

1. The First Sumas 300 M^2cf/d was extended from 1977 through 1991.
2. An additional Sumas M^2cf/d was provided for as follows:
   (a) 100 M^2cf/d beginning 11-1-66
   (b) 100 M^2cf/d beginning 11-1-67
   (c) 100 M^2cf/d beginning 11-1-69
3. El Paso was given an option to purchase still another 300 M^2cf/d as follows:
   (a) 100 M^2cf/d beginning 11-1-70
   (b) 100 M^2cf/d beginning 11-1-71
   (c) 100 M^2cf/d beginning 11-1-72

The Federal Power Commission in its opinion authorized only the importation of the 200 M^2cf/d shown on lines 2a and 2b above (which is the alternate proposal described on page 6, footnote 9 of El Paso's Plan of Divestiture). This change was incorporated in the February 28, 1966 agreement by supplement dated October 6, 1967. This supplement provides for 200 M^2cf/d at a minimum 90% load factor for a period of 20 years.

Although the second Sumas Agreement provided for the delivery of 300,000 MCF per day and an option to El Paso to purchase still another 300,000 MCF per day, the Federal Power Commission has authorized the importation of only 200,000 MCF per day, and the Federal Power Commission required the execution of a new contract between El Paso and West Coast covering only this 200,000 MCF per day. However, Mr. McMann, Chairman of the Board of West Coast, has indicated that the remaining 400,000 MCF per day would still be available to either El Paso or New Company.

The Sumas gas is delivered to El Paso at the international boundary between British Columbia and the State of Washington near Sumas, Washington.

The Kingsgate gas is delivered by West Coast to Pacific Gas Transmission Company facilities at the Kingsgate import point on the international boundary between British Columbia and Idaho and PG & T delivers the gas to the Pacific Northwest system in Spokane County, Washington.

WEST COAST STOCK AND SUMAS EXCHANGE AGREEMENT

The acquisition of the West Coast stock by PNW and the Sumas Exchange Agreement arose out of the same set of circumstances and the same negotiations and many of the Findings of Fact relate to both transactions.

West Coast Transmission Company and PNW were competitors in a hotly contested proceeding before the Federal Power Commission for a certificate to serve the

Pacific Northwest. West Coast, which was a gathering and transmission company in the Ft. Nelson and Ft. St. John area in Canada, was seeking to serve the Pacific Northwest with Canadian gas while PNW was proposing to serve the same market with gas from the San Juan Basin.

Pacific Northwest prevailed. This left West Coast with a supply of gas and a plan, but no certificate and no prospect of serving the Pacific Northwest.

PNW was relying upon a supply of gas that it had obtained from Phillips and Pan American in the San Juan Basin, but which required that PNW drill the wells. This entailed a large outlay of money which PNW could not raise because West Coast had taken an appeal from the decision of the Federal Power Commission and in the face of this appeal, PNW was incapable of financing either its drilling or construction programs.

Because of this situation, between June of 1954 and December of the same year, negotiations were carried on between West Coast, PNW, and El Paso, seeking a solution.

Out of these negotiations, there grew a three-party agreement whereby West Coast agreed to build a pipeline to Sumas and there deliver to PNW 300,000 MCF of gas per day. This was more gas than PNW felt it could digest and yet that was the minimum amount which West Coast thought would make the pipeline economically feasible. Consequently, El Paso agreed that it would take 250,000 MCF of the 300,000 MFC and dispose of it in the California market. These efforts failed, so El Paso proposed that if PNW would take the 200,000 of the

300,000 MFC, El Paso would take the other 100,000 MCF by purchasing from PNW, 100,000 MCF per day of PNW's San Juan gas at a total price of $.25 per MCF. This arrangement was ultimately approved by the Federal Power Commission and is commonly referred to as the Sumas Exchange Agreement.

Also as a part of this three-way agreement, West Coast agreed to withdraw its appeal from the Federal Power Commission's certification of PNW and that PNW should acquire 25 percent of the West Coast stock at a price of $5.00 per share.

After the acquisition of PNW by El Paso, there was no reason to keep the Sumas Exchange Agreement in operation, and it became inoperative.

Acquisition of West Coast Stock by El Paso

PNW acquired 25 per cent (1,127,750 shares) of the West Coast stock in the spring of 1955 in the name of West Coast Investment Co., a wholly-owned subsidiary of Pacific Northwest.

When El Paso, on January 1, 1957, acquired control of PNW through the stock acquisition, it also acquired the stock of West Coast Investment Company and thereby the West Coast stock. It its prospectus issued by El Paso in connection with the stock acquisition, (El Paso Exhibit 3) El Paso listed the West Coast stock as having a market value on January 2, 1957, of $29.00 per share. Presumably, that value of the West Coast stock was included in computing the value of El Paso stock to be exchanged for PNW stock, and the Court finds that El Paso in effect paid the equivalent of market value for

that stock, although for tax purposes, the stock still retained its original cost of $5.00 per share.

After El Paso acquired stock control of PNW and before the merger, the first preferred dividend payment matured on PNW's preferred stock. PNW had no profits with which to pay the dividend. Since the dividend had to be paid out of profits, El Paso bought 220,000 shares of the West Coast stock from PNW at a price of $26.00 per share. Since PNW's book value of the stock was $5.00 per share, this created a profit from which PNW could legally pay its preferred dividends.

After the merger between El Paso and PNW, West Coast issued some additional stock, and the present percentage of the stock owned by El Paso is 18 percent of the total. Also after the merger, El Paso purchased from Pacific Petroleum Ltd., 29,375 shares at a total cost of $526,632.96 which was the market value of the stock.

The Court further finds that El Paso should divest itself of this stock because West Coast is one of the principal suppliers of gas to the New Company, and El Paso, by virtue of its stock ownership, could exercise some influence in the operations of West Coast.

INVESTMENTS

PHILLIPS PACIFIC CHEMICAL COMPANY

Phillips Pacific Chemical Company owns and operates a fertilizer plant near Hedges, Washington, and is a gas customer of the northwest division. El Paso owns 49 percent of the stock of this company, and although its investment in this stock is only $200,000, El Paso's stock interest is now worth approximately $2,641,000. El Paso Exhibit 32 shows that the income of Phillips Pacific for the year 1957 was a net loss of $435,000 and the net income for the year 1966 was $1,306,000. El Paso proposes to divest this stock to New Company. The Court finds that the divestiture of this stock to New Company would be for its best interest.

PACIFIC NORTHWEST REALTY CORPORATION

The Pacific Northwest Realty Company was a wholly-owned subsidiary of PNW, and upon the merger became a wholly-owned subsidiary of El Paso. This company owns a nine-story office building in Salt Lake City, which was formerly the headquarters of PNW. El Paso Exhibit 31 discloses the properties are under lease to El Paso for a term of 25 years ending in 1983. That exhibit also contains the financial statement of this company.

El Paso proposes to divest this company to New Company, and the Court finds that such divestiture is in the best interest of New Company.

NORTHWEST PRODUCTION CORPORATION STOCK

At the time of the stock acquisition on January 1, 1957, PNW owned 69 percent of the stock of Northwest Production Corporation, being 6,664,000 shares. At that time, the stock was being traded over the counter at $6.50 per share, and the shares acquired by PNW represented a value of $43,316,000.

At the time of the stock acquisition, Northwest Production was engaged in the exploration for and production of gas in the San Juan Basin and had had some leases on which some wells had been drilled. It is selling natural gas to El Paso, but these contracts will be transferred to New Company at the time of the divestment.

Northwest Production also owns a gasoline plant located in the Permian Basin in West Texas which is owned by a company called Barnhart, which is a wholly-owned subsidiary of Northwest Production.

El Paso now owns 90 percent of the stock of Northwest Production, the balance of the stock having been acquired since El Paso's stock acquisition of PNW.

Northwest Production does not have any assets of any consequence, other than the leases and the gasoline plant in the Permian Basin.

The Northwest Production acreage has been disappointing and although there has been some wildcat drilling, the majority of its drilling activity has been in the development of proven acreage.

The capital investment of the company is far in excess of the earnings and it operates at a loss. (See Annual Report, El Paso Exhibit 39.)

BELCO PETROLEUM CORPORATION NOTES

In 1957, when El Paso was undertaking to acquire additional reserves in the Big Piney area for the northwest division, El Paso entered into a contract with Belco Petroleum to make advances of funds to be used by Belco for the drilling of wells in the Big Piney area. The agreement called for a line of credit to be extended by El Paso to Belco of $8,750,000. Belco only availed itself of a little over $2,000,000 which is payable to El Paso from 50 percent of the production of the wells drilled, and any balance remaining unpaid on December 31, 1975, becomes due and payable at that time. The balance due at the end of 1967 was $1,125,000. El Paso proposes to divest these notes to New Company. Belco Petroleum is a successful oil producer, and its stock is traded on the New York Exchange. On October 16, 1967, this stock was selling for $43.00 a share.

The Court finds that it would be to the best interest of New Company for El Paso to divest these notes to it.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CIVIL ACTION No. 143-57

UNITED STATES OF AMERICA,
Plaintiff,

— vs. —

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION,
Defendants.

ORDER

Dated June 21, 1968

The Court having this day entered its Findings of Fact, Conclusions of Law, and Opinion:

IT IS ORDERED:

1. That the plan of divestiture set forth in the Findings of Fact, Conclusions of Law, and Opinion this day entered by the Court shall be the plan by which the divestiture required by the Supreme Court in *United States* v. *El Paso Natural Gas Co.*, et al., 376 U. S. 651, and *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, et al., 386 U. S. 129, shall be accomplished.

2. That Colorado Interstate Gas Company, having been selected as the successful applicant to acquire control of Northwest Pipeline Company, to which the assets to be divested will be transferred, is hereby made a party to these proceedings.

3. That Colorado Interstate Gas Company and El Paso Natural Gas Company shall immediately proceed to enter into negotiations and comply with the procedures set forth in the "First Step" of the Procedures to Implement the Plan of divestment, which procedures are set forth in the Court's opinion this day entered.

4. That Colorado Interstate Gas Company and El Paso Natural Gas Company shall cause the Department of Justice to be advised of the time and place of all negotiations carried on under the "First Step" of the procedure, and the Department of Justice may have a representative present at all such negotiations if it so desires.

5. That Colorado Interstate Gas Company and El Paso Natural Gas Company shall, on or before July 26, 1968, file with the Court, a report of the results of the negotiations and procedures had pursuant to "First Step" and serve a copy thereof upon all parties to this proceeding and the applicants for acquisition.

Entered this 21st day of June, 1968.

BY THE COURT:
/s/Hatfield Chilson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION
CIVIL ACTION No. 143-57

UNITED STATES OF AMERICA,
Plaintiff,

— vs. —

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION,
Defendants.

ORDER
Dated August 29, 1968

On June 21, 1968, the Court entered tentative Findings of Fact, Conclusions of Law and Opinion. Thereafter and by Order entered July 30, 1968, the Court ordered:

> "- - - that all patries in interest (not including applicants for acquisition) may file objections to the Court's Findings of Fact, Conclusions of Law and Opinion, and to the report of the negotiators on or before August 19, 1968, and that all objections so filed will be heard at 9:30 A.M. on August 23, 1968, in Courtroom 'C' in the U. S. Courthouse in Denver, Colorado."

Objections to the tentative Findings of Fact, Conclusions of Law and Opinion were filed by the United States, the State of California, Southern California Edison Company, and the Utah Public Service Commission.

On August 23, 1968, the Court heard the objections and took them under advisement and is now advised.

IT IS ORDERED that the tentative Findings of Fact, Conclusions of Law and Opinion entered by the Court on the 21st day of June 1968, are hereby amended in the following respects:

1. In the last sentence of the last paragraph on page 55, the date of "June 20, 1969." is amended to read, "June 30, 1969."

2. There is added at the bottom of page 55 the following:

   "If New Company at that time (June 30, 1969) is in control of the properties to be divested under a certificate of authority issued by the Federal Power Commission, any additional use of El Paso of New Company-San Juan reserves shall be subject to Federal Power Commission regulation.

   "If at that time, (June 30, 1969) New Company is not in control of the properties to be divested pursuant to such a certificate, El Paso and CIG and/or New Company may enter into an agreement permitting El Paso to continue to use not to exceed 100,000 MCF per day of New Company-San Juan reserves, provided that any such agreement shall require El Paso to return to New Company, an equivalent amount of gas; and provided further that when New Company assumes control of the divested properties pursuant to a certificate issued by the Federal Power Commis-

sion, any further use of gas from the San Juan reserves of New Company by El Paso shall be subject to Federal Power Commission regulation."

3. The last full paragraph on page 69 and the last paragraph beginning at the bottom of page 69 and ending on page 70 are amended to read as follows:

"Edison would disqualify CIG from consideration because Edison did not interpret CIG's testimony and Brief as evidencing a clear policy to offer service to Edison on the same non-discriminatory basis as CIG might be willing to offer service to other buyers in California. It is Edison's position that no applicant may acquire these assets who would exclude Edison (or any other significant California buyer desiring service) from competitive access to any service offered in the California market, for such exclusionary practice or policy might tend to substantially lessen competition or foster an illegal monopoly in contravention of the very laws now sought to be enforced.

"We have again read and considered the testimony of the CIG witnesses referred to by Edison at page 64 of its Brief filed herein on April 17, 1968, and find therein no statement of policy or position or intent to exclude Edison from consideration for service by a direct sale. The witnesses did not commit CIG to serve Edison directly, but also, they did not rule out the possibility of a direct sale. A direct sale to Edison is only one way to enter the California market and it would be a mistake, if not improper, for this Court to dictate how New Company should or should not attempt to compete."

IT IS FURTHER ORDERED that except to the extent granted by the foregoing amendments, all objections to the Court's Findings of Fact, Conclusions of Law and Opinion are overruled and denied, and as amended hereby the Court's tentative Findings of Fact, Conclusions of law and opinion entered on June 21, 1968, are hereby made the Findings of Fact, Conclusions of Law and Opinion of the Court. This order is hereby declared to be a final judgment from which appeal may be taken.

Entered this 29th day of August, 1968.

BY THE COURT:
/s/Hatfield Chilson

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil Action No. 143-57

UNITED STATES OF AMERICA,
Plaintiff,

— vs. —

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION,
Defendants.

ORDER
Dated November 7, 1968

By Order dated August 29, 1968, the Court entered its Findings of Fact, Conclusions of Law and Opinion. On September 6, 1968, El Paso Natural Gas Company filed a Motion to Amend the same to permit El Paso to retain its non-utility investments in Phillips Pacific Chemical Company and Pacific Northwest Realty Corporation in accordance with the agreement negotiated between El Paso and CIG.

Upon notice to all parties in interest, the motion was heard in open court and it appearing to the Court that the divestment of these investments is not essential to accomplish the Court's plan of divestment, nor is such divestment required by the mandate of the Supreme Court,

IT IS THEREFORE ORDERED that the motion is hereby granted and the Order of August 29, 1968, is hereby amended to include the following amendments to the Court's Findings of Fact, Conclusions of Law and Opinion:

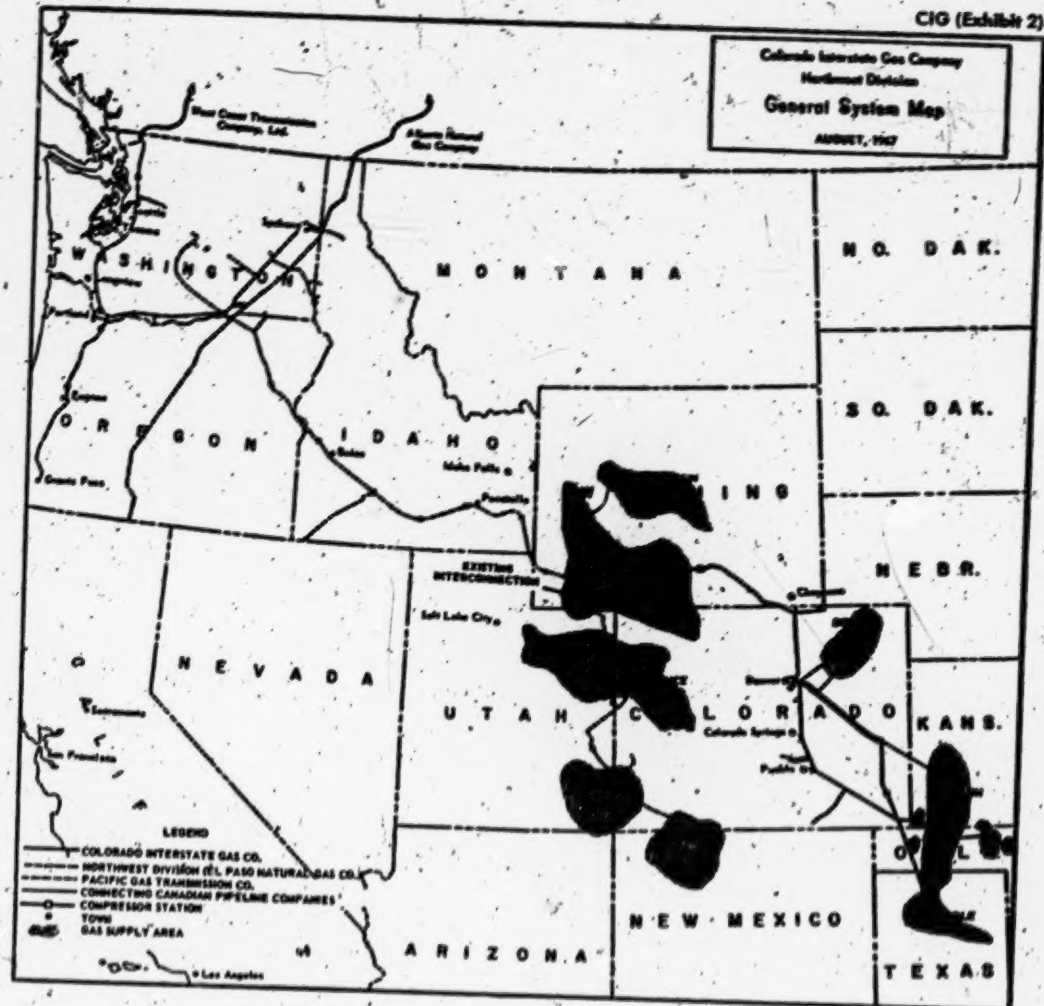
1. The last sentence of the first full paragraph of page 26 of the Court's Findings of Fact, Conclusions of Law and Opinion is hereby stricken and in lieu thereof, the following sentence is substituted.
   "The investments above described are non-utility in nature and their divestment is not essential to the Court's plan of divestment nor is divestment required by the Supreme Court's mandate, and they may either be divested to New Company or retained by El Paso, as El Paso and the successful applicant selected by the Court may agree."
2. The last two sentences of the first full paragraph on page 12 and the first sentence of the first full paragraph on page 13 of the Appendix to the Court's Findings of Fact, Conclusions of Law and Opinion are hereby stricken and in lieu of each of these passages, the following sentence is substituted:
   "The Court has previously found that El Paso need not divest this asset."

IT IS FURTHER ORDERED that except as amended hereby, the Findings of Fact, Conclusions of Law and Opinion of the Court entered by the Court's Order of August 29, 1968, shall remain in full force and effect and this Order as amended hereby is declared to be a final judgment from which appeal may be taken.

Entered this 7th day of November, 1968.

BY THE COURT:
/s/Hatfield Chilson
United States District Judge

CIG (Exhibit 2)



IN THE

Supreme Court of the United States

October Term, 1968

Utah Public Service Commission, *Appellant*

v.

El Paso Natural Gas Company, et al., *Appellees*

On Appeal from the United States District Court for the District of Utah

---

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION, *Appellant*

v.

EL PASO NATURAL GAS COMPANY, ET AL., *Appellees*

On Appeal from the United States District Court for the District of Utah

---

MOTION TO AFFIRM

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, Intervenors in the case below and Appellees herein, hereby move, pursuant to Rule 16 of the revised Rules of the Supreme Court of the United States, that the final judgment and decree of the United States District Court for the District of Utah be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT

On April 6, 1964, this Court, in *United States of America v. El Paso Natural Gas Company*, 376 U.S. 651, found that the acquisition of the assets of Pacific Northwest Pipeline Corporation by El Paso Natural Gas Company substantially lessened competition in the sale of natural gas in California in violation of Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 18, and this Court ordered "divestiture without delay" (p. 662).

Upon remand, a divestiture plan was approved by the District Court, but upon appeal this Court on February 27, 1967, in *Cascade Natural Gas Corporation v. El Paso Natural Gas Company*, 386 U.S. 129, among other things, disapproved the District Court's order of divestiture and remanded the case again, stating:

> "Once more, and nearly three years after we first spoke, we reverse and remand, with directions that there be divestiture without delay . . . ." (p. 142)

Upon remand, hearings began on June 9, 1967. The taking of evidence and hearings on motions consumed 11,083 pages of transcript as of November 7, 1968.

In the present order appealed from, the District Court accomplished two things. One, it designated the assets to be divested from El Paso, and as to this no appeal has been taken. Two, it chose Colorado Interstate Corporation (formerly Colorado Interstate Gas Company and hereinafter referred to as "CIG") as the successful applicant for acquisition, and it is to this choice that an appeal has been taken.

Simply put, Appellant complains that the selection of CIG as the successful applicant for the acquisition of the divested Northwest Division of El Paso does not restore competition to California as directed by *El Paso* and

Cascade, supra, and also that such selection will eliminate competition in other markets in violation of Section 7 of the Clayton Act.

It is the position of these Appellees that affirmance of the District Court's selection of CIG as the successful purchaser of the divested assets of the Northwest Division finally will result, after the lapse of five years since "divestiture without delay" was ordered, in a strong new competitor to the California market.

ARGUMENT

THE SELECTION OF CIG AS THE PURCHASER OF NEW COMPANY WILL PROVIDE A STRONG NEW COMPETITIVE FORCE IN CALIFORNIA.

The largest market served by El Paso Natural Gas Company consists of its sales to our Companies. Southern California Gas Company and Southern Counties Gas Company of California are gas public utilities serving in excess of ten million people in Central and Southern California. Our certificated service areas in which we provide gas public utility service extend from just south of Fresno in Central California to the Mexican border, being bounded on the West by the Pacific Ocean and on the East by the Colorado River forming the Arizona border (Tr. 9481-82).

This Court in its decision in *El Paso, supra,* which ordered the divestiture now implemented by the District Court, accurately referred to the "vast California market" as one whose "incremental needs are booming". These Appellees, referred to in *El Paso* as "Southern Companies", continue to have a ravenous need for additional gas supplies. The market growth in our service areas continues to be the epitome of what the Court described.

This Court has made abundantly clear its intent that the company to be divested from El Paso should be in a strong position to provide potential competition to El Paso in serving the California market. The trial court's selection of CIG as the successful applicant will accomplish that precise purpose.

Our intent in this proceeding has not been to influence the selection of or to defend the selection of any particular applicant. Our interest and objective is to have a new pipeline company available to compete with El Paso and other potential sources of supply for the California market as rapidly as possible. We deliberately refrained from expressing to the trial court any preference as to which applicant should be selected. Our reasoning is best explained in the brief these Appellees filed with the trial court on April 12, 1968, in which we stated:

> "We will not comment on the qualities of the applicants in this brief. Our reasons, as stated in our Comments filed in this matter on September 18, 1967, are: 1) indication of our support or opposition could result in unfair favoritism or prejudice to one applicant or another; and 2) as the largest potential customer of New Company we should remain in a position to discuss and negotiate with the Court's ultimate choice of a purchaser for early gas service to our market without having made a prior commitment to any applicant. We feel the latter reason is of particular importance to insure that the Supreme Court's mandate that New Company be an early competitive factor in the California market be met. Therefore, our brief is confined to commenting on certain issues and will not include a discussion of the several applicants."

The selection has now been made. No good reason exists to set it aside.

It was quite apparent throughout this reopened proceeding consuming more than 11,000 pages of transcript that the trial judge was proceeding with exemplary judicial restraint and making every human effort to avoid the possibility of one more reversal by this Court and a further prolongation of the proceeding.

Bluntly stated, it is time for this proceeding to come to an end. There are no applicants that can possibly satisfy all parties. To reopen the proceedings and select a different applicant could result only in further appeals to this Court by disappointed parties.

Time in and of itself is becoming a vital factor in the determination as to whether, in fact, New Company will ever have the opportunity to serve the California market. Our Companies introduced evidence into this proceeding that our supply needs are such as to make a new pipeline to serve our Companies economically feasible as early as 1970 (Tr. 9488).

Our needs for a new supply area to serve California are very real. Since the selection of CIG as the successful applicant, these Appellees and other California interests have entered into serious negotiations with CIG for the express purpose of achieving a new California project (Tr. 11,062-63, 11,068). This effort will be rendered nugatory and we shall have to look elsewhere for gas supplies if Utah's present effort should prove to be successful. The prospect of New Company penetrating the California market in accordance with this Court's expression in *El Paso* and in *Cascade* may then in retrospect prove to have been an ephemeral wish.

This Court must bear in mind that pipeline company competition has never been as intense throughout the United States as it is today. Contrary to the facts as they existed when this Court issued its original decree in this proceeding,

there are several strong pipelines serving California today. The trial judge recognized this new fact of life when he so clearly stated at Tr. 11,029:

> ". . . if it were not for the fact that this Court is satisfied that Colorado Interstate Gas Company because of the reasons set forth in the Court's opinion, is so far superior to any other Applicant and its ability to furnish real competition against these entrenched suppliers of the California market, the Court would not have selected Colorado Interstate . . . ."

CONCLUSION

The thrust of this response is along the lines in which these Appellees believe they can be of maximum assistance to this Court. It is intolerable that the final resolution of this proceeding with its attendant impact upon both the California and Northwest markets be further delayed. In the best interest of California consumers, we respectfully urge that this Court affirm the judgment below.

Respectfully submitted,

SOUTHERN CALIFORNIA GAS COMPANY
SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA

By JOHN ORMASA
Their Attorney

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IN THE

Supreme Court of the United States

October Term, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION,
Appellant,

v.

EL PASO NATURAL GAS COMPANY, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

JOINT MOTION TO AFFIRM OR IN THE ALTERNATIVE TO DISMISS, AND BRIEF, OF APPELLEES, CASCADE NATURAL GAS CORPORATION, INTERMOUNTAIN GAS COMPANY, NORTHWEST NATURAL GAS COMPANY, THE WASHINGTON WATER POWER COMPANY, WASHINGTON NATURAL GAS COMPANY, IDAHO PUBLIC UTILITIES COMMISSION, PUBLIC UTILITY COMMISSIONER OF OREGON AND WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION.

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MOTION TO AFFIRM OR DISMISS

Cascade Natural Gas Corporation, Intermountain Gas Company, Northwest Natural Gas Company, The Washington Water Power Company, Washington Natural Gas Company, Idaho Public Utilities Commission, Public Utility Commissioner of Oregon and Washington Utilities and Transportation Commission, intervenors in the case below and appellees herein, hereby move, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, that the final judgment and decree of the

United States District Court for the District of Utah be affirmed, or in the alternative the appeal be dismissed on the grounds that appellant, the Utah Public Service Commission, has no standing to appeal, the questions presented are so unsubstantial as not to warrant further argument, and the noting of probable jurisdiction of this appeal would defeat the mandate of the Supreme Court that divestiture be accomplished without delay.

STATEMENT

The appellees named herein (hereinafter referred to as Northwest intervenors) adopt the Statement of Southern California Gas Company and Southern Counties Gas Company of California appearing at pages 2 and 3 of their Motion to Affirm.

The five companies joining herein are natural gas distributors serving natural gas at retail in Oregon, Washington and Idaho. The three state commissions joining herein are the regulatory agencies of Oregon, Washington and Idaho.

SUMMARY OF ARGUMENT

Appellant has shown no substantial, direct interest which has been or will be adversely affected or injured by the acquisition by Colorado Interstate Company (formerly Colorado Interstate Gas Corporation)[1] of El Paso's Northwest Division properties following their divestiture. Appellant therefore has no standing to appeal from the divestiture decree authorizing such acquisition. Appellant likewise has no standing to assert possible anti-trust effects of the acquisition which, if they exist, relate to the interests of other parties who were ade-

1. Colorado Interstate Corporation is hereinafter referred to as "CIG."

quately represented before the District Court and who have not appealed.

Acquisition of El Paso's divested properties by CIG will fully comply with the mandate and the guidelines respecting divestiture without delay hitherto ordered by this Court. Appellant's declared interest in maintenance of Northern Division Headquarters in Utah is neither relevant nor substantial enough to require a finding of probable jurisdiction. The evidence does not support appellant's contention that CIG's acquisition may substantially lessen competition in, or tend to create a monopoly as to, sales of natural gas in Utah, or elsewhere.

The public interest of natural gas consumers throughout the Far West has suffered and continues to be adversely affected by the uncertainties of protracted litigation over this divestiture. A compelling need exists for avoidance of further delays in concluding a divestiture that has consumed thirteen years during which an illegal acquisition has been preserved.

ARGUMENT

Appellant Has No Standing to Appeal as It Is Not Injured or Affected by the Decree of the District Court

Appellant is an agency of the state of Utah having regulatory jurisdiction limited to intra-state service by utilities and transportation companies. It has no regulatory jurisdiction over natural gas pipeline companies subject to the jurisdiction of the Federal Power Commission, nor does it have any statutory power to enforce the anti-trust laws enacted by Congress.

In *Cascade Natural Gas Corporation v. El Paso Natural Natural Gas Co.*, 386 U.S. 129 (1967), this Court held

that the intervention of interested parties should be allowed on the grounds that the then existing parties could not represent their varied interests in the divestiture of El Paso's Northwest Division. The District Court allowed the intervention of twenty-two parties.

The District Court, on June 9, 1967, at a pre-hearing conference (Tr. 117),[2] directed all intervenors to file comments regarding all applicants for acquisition of El Paso's Northwest Division and indicating the intervenors' approval of or their opposition to the various applicants, the various plans and their reasons therefor. Appellant's comments as filed, however, did not reflect any opposition to CIG or to its plan, nor did its comments reflect opposition to any applicant on anti-trust grounds.

Appellant did not at any time during the trial raise any issue concerning anti-trust implications of any applicant.

In its initial brief, filed April 19, 1968, appellant clearly disclosed its limited self-interest, to-wit:

> "The state of Utah has a special, albeit, narrow interest in this proceeding in one respect which is where the new company will be headquartered. It is recognized that this question is not of substantial interest to the parties or other intervenors, nor is it an important aspect of the decisions from the Supreme Court which are controlling in this proceeding. However, Utah is desirous that the headquarters of the new company be re-installed in the Pacific Northwest Building now known as the El Paso Natural Gas Building in Salt Lake City, Utah."

Thus, appellant's only demonstrated interest during the entire trial, which consumed in excess of fifty-seven

2. Transcript references are to the Transcript in the District Court.

days was the matter of where the headquarters of the new company might be located.

Appellant did not even appear at the oral argument on June 3, 1968 before the District Court (Tr. 9885). The District Court rendered its findings, conclusions of law, and opinion dated June 21, 1968.

Appellant's objection to CIG as an applicant for acquisition was presented in open court on August 23, 1968, at which time appellant was advised by the court as follows:

> "Mr. Berman: Your Honor, I would desire 30 minutes if that would be possible for the court. Let me say, I understand the court has indicated that they only wanted supplementary argument. I think we have tried to adequately set forth our position in the brief, but I would like to have the opportunity to argue it, if the court would give me . . .
>
> "The Court: I can't allow you that much time, Mr. Berman. We have got too much ground to cover in one day.
>
> "And may I point out, of course, for the record, what you already know, that this is a matter that is brought before the court by Utah for the first time at this time. And for the record, I point out that in the brief filed April 19, 1968, which is the time that Utah should have raised this question, the state of Utah says in part: 'The state of Utah has a special, albeit narrow, interest in this proceeding in one respect, which is where the new company will be headquartered.'
>
> "That's the only objection or ground—or not objection, but the only ground upon which Utah submitted its case. They produced no evidence of CIG's operations. They filed no brief attacking CIG's qualifications.
>
> "Now, for that reason, I think that this should be a part made clear in the record.

"Secondly, the court considered the anti-trust implications of Colorado Interstate very thoroughly before entering its Findings of Fact and Conclusions of Law. The court has also read Utah's brief, is well advised of the contentions of Utah, and even though they did not raise the issue at the previous time, the court will not use that as a means to prevent consideration of the objections of the Utah Public Service Commission.

"Now, with that statement, Mr Berman, you may have 15 minutes." (Tr. 9976-9977)

Thus, a pertinent question is why appellant now raises an anti-trust issue as to the selection of CIG when appellant did not in its comments filed with the court nor at any time during the trial show the slightest concern about anti-trust considerations involving CIG, Wyoming gas reserves, additional pipeline service to California and the Pacific Northwest, or sales of gas in Utah.

The Northwest intervenors submit that the right to intervene accorded the state of California by *Cascade Natural Gas Corporation v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), did not grant appellant herein a right or standing to appeal on grounds which have no substantive connection with its stated interest in the case below, to-wit; the location of the New Company's headquarters. Thus, this appeal lacks the substantiality required by this Court's Rule 15 (1)(f).

Furthermore, appellant's jurisdictional statement[3] in no way discloses that appellant is injured, adversely affected, or has any "personal stake" in the result. The Supreme Court's decisions make it clear appellant, under

3. References to pages of Appellant's Jurisdictional Statement are herein designated by the prefix "J.St."

the circumstances, has no "standing" to appeal. *Frothingham v. Mellon*, 262 U.S. 447 (1923); *Lehon v. City of Atlanta*, 242 U.S. 53 (1916); *City of Chicago v. Chicago Rapid Transit Co.*, 284 U.S. 577 (1931); *McCandless v. Pratt*, 211 U.S. 437 (1908); *County Court of Braxton County v. West Virginia ex rel. Dillon*, 208 U.S. 192 (1908); *Flast v. Cohen*, 392 U.S. 83 (1968).

In *Frothingham, supra*, a private citizen alleged that as a taxpayer she had standing to raise constitutional questions with regard to a Federal Maternity Act. The court made the following comment concerning "standing to appeal":

> "The party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining *some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with other people generally.*" 262 U.S. at 488. (Emphasis supplied.)

Chicago Rapid Transit, supra, is a case closely analogous to the instant one. There the Supreme Court held the City of Chicago, which had been permitted by the District Court to intervene as a defendant in a suit brought to restrain the Illinois Commerce Commision, and the attorney general of the state had no separate standing to appeal from a decree enjoining the enforcement of a rate order. The appellant's position is considerably weaker than that of the City of Chicago.

The most recent decision to elaborate upon the requirements of standing is *Flast v. Cohen*, 392 U.S. 83 (1968). In *Flast*, the plaintiffs, who were federal income taxpayers, brought suit in District Court alleging that the

establishment-of-religion clause of the First Amendment was violated by the expenditure of federal funds to finance construction in religious schools. The District Court dismissed the complaint, holding that the plaintiffs' status as federal taxpayers did not give them standing to sue. On appeal, while the Supreme Court reversed the District Court, this Court made the following comment which is compelling in the instant case:

> "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The *'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr*, 369 U.S. 186, 204 (1962). *In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.*" 392 U.S. at 99, 100. (Emphasis supplied.)

Appellant has not pointed to any facts in the record showing that it, or the people of Utah, whose interest it purports to serve, has been adversely affected by the judgment below. There is only the bare allegation of a threat of lessened competition in Utah (J.St. 30-31). The other alleged anti-trust violations relate to the states of California, Wyoming, Colorado, Idaho, Oregon and Washington, whose interests were fully represented by the Department of Justice, the state regulatory bodies and private intervenors, none of which has appealed. In effect, appellant is assuming to prosecute a "class

action" by this appeal although all members of the class have been fully represented to their own satisfaction.

Further, insofar as Utah is concerned, the record does not sustain appellant's contention of concern regarding its alleged anti-trust fears within the state of Utah and certainly does not raise a question so substantial that it requires plenary consideration by this Court. The key word in Rule 15(1)(f) of the Revised Rules of the Supreme Court of the United States establishing this test, is "substantial." Likewise, the key word "substantially" is found in the test of the effect of an acquisition set forth in Section 7 of the Clayton Act (38 Stat. 731 (1914), as amended, 64 Stat. 1125 (1950), 15 U.S.C. §18 (1958)), the only statute involved in this appeal. The Northwest intervenors submit that the tests of substantiality depend upon the relative importance of the anti-competitive factor in acquisition in comparison with other important considerations.

A careful segregation of the actual facts in the record from the strained inferences and unfounded legal contentions which appellant has skillfully interwoven into that portion of its Jurisdictional Statement entitled "The Facts," reveals no more than the "ephemeral possibilities" of lessened competition or tendency toward monopoly which this Court and others have repeatedly stated to be inadequate to sustain a contention similar to appellant's. (See discussion below, page 13 *et seq.*)

Wholly apart from the question of appellant's standing to appeal, there is, as hereinafter shown, insufficient substance in appellant's contentions to sustain a finding of probable jurisdiction.

Acquisition by CIG of the Divested Properties Will Fulfill the Mandate of the Supreme Court

The mandates of this Court in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), and *Cascade Natural Gas Corporation v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), directed that the District Court order divestiture to a company independent of El Paso which would be strong enough to compete in the California market and at the same time serve the needs in El Paso's Northwest Division. In effect, the appellant contends that the District Court performed its task too well in selecting CIG as the successful applicant. The validity of appellant's contention must be tested in the light of applicable decisions of this Court interpreting Section 7 of the Clayton Act in conjunction with the specific directives of this Court's mandate, which constituted the law of the case, by which the District Court was controlled.

The history leading to the judgment from which this appeal is taken and the purpose of the divestiture plan to be established by that judgment are well known to the members of this Court. The merger of Pacific Northwest Pipeline Corporation into El Paso Natural Gas Company was determined to be illegal by eliminating Pacific Northwest from probable competition in the California market. Restoration of such probable competition in that market was "at the heart" of the Supreme Court's mandate for divestiture. In the period from 1957 to the present, suppliers of out-of-state gas to the California market have increased from one (El Paso) to three operating pipelines, each of which has combined resources in excess of those of the proposed combination of CIG and El Paso's

Northwest Division. Appellant recognizes that New Company, after divestiture, will not have a sufficient gas supply to enable it to immediately compete in the California market (J.St. 10). The purpose of the divestiture is to create an entity which can become an effective competitor in the California market and adequately serve the needs of the Northwest Division, all within the shortest practicable time.

The court below gave full consideration to this historical background and the purpose to be accomplished under the mandate of this Court. The following is quoted from the District Court's opinion set forth in the Appendix to appellant's Jurisdictional Statement:

> "The court finds, as do most of the intervenors, that all of the applicants are not equally qualified to make New Company a competitive factor in the California market. The court also finds that of those applicants who are so qualified, all do not have the capability of furnishing the same degree of competition. The court conceives its duty to be to select not only an applicant qualified to make New Company a competitive factor, but the applicant which in the court's opinion can and will furnish through New Company, the greatest degree of competition and the greatest impact on the California market.
>
> "To select less than the strongest and best qualified applicant, gives to El Paso an unwarranted advantage in the competitive race for the California market, and particularly so when in the court's opinion, New Company will be confronted with a much more formidable task in becoming such a competitive factor than was PNW for reasons which follow." (J.St. 93, 94)

The court found that CIG was superior in the following respects: a long history of successful pipeline operation, the advantage of physical interconnection of its system

with that of the Northwest Division; availability of experienced management and personnel which would restore competition in a shorter period; regulatory experience; ample financial capability to finance an invasion of the California market; a demonstrated ability to acquire needed reserves for its own system as well as California and Northwest markets and a greater incentive to expand to California because of its acquisition of all of the common stock of the New Company (J.St. 96, 97).

In *Cascade Natural Gas Corporation v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), this Court said at page 135:

> "In the present case protection of California interests in a competitive system was at the heart of our mandate directing divestiture."

Considering the history of the case and the purpose of the mandate of this Court, should the District Court have refused to select CIG and ordered divestiture to some other applicant, inferior in the above respects and incapable of restoring effective competition to California in as short a time?

If an applicant weaker than CIG had been selected, would the California interests have been protected in an adequately competitive system? Would the people of the State of California or Southern California Edison Company who were successful appellants in *Cascade, supra*, have been satisfied? Would Cascade Natural Gas Corporation and the other Northwest intervenors be satisfied with such a weaker applicant?

In selecting CIG to be the successful applicant, the District Court fulfilled the mandate of this Court.

Acquisition by CIG of the Divested Properties Will Not Lessen Competition or Tend to Create a Monopoly

The appellant contends that the acquisition of El Paso's Northwest Division properties by CIG, through its wholly owned subsidiary, Northwest Pipeline Corporation, creates a violation of Section 7 of the Clayton Act (1) by substantial lessening of competition in (a) the California natural gas market, (b) the market for gas reserves in Wyoming and/or (c) the natural gas market in Utah and western Colorado; or (2) by enhancing the alleged monopoly power of CIG (a) in the market area from eastern Colorado to the Pacific Northwest and/or (b) in the natural gas industry in general (J.St. 4, 5).

The foundation of appellant's contention is that, if CIG did not acquire the assets to be divested, there would be two additional competitors instead of only one in California and one additional competitor in each of the other market areas. It is contended that the New Company, controlled by another applicant, would afford competition for natural gas sales in California, the northwestern states and in Utah and western Colorado and also competition for gas reserves in Wyoming. It is also contended that, even without the acquisition of the divested assets, CIG would constitute a competitive factor, either by actually selling or buying in those markets or standing at the edges of them prepared to engage in competition.

Appellant's postition could be sustained only if it were found that if a New Company not controlled by CIG entered or threatened to enter one of those markets, CIG, by itself, would also enter or be capable and motivated to

do so. If either capability or motivation would be absent, competition would not be lessened by CIG's acquisition of the Northwest Division. *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

This brings us to the test of "probability" of an anti-competitive effect of the proposed acquisition, either in the lessening of competition or the tendency toward monopoly.

Brown Shoe Co. v. United States, 370 U.S. 294 (1962), involved both aspects of Section 7, a lessening of competition and the tendency to monopoly. This Court expressed the congressional intent as follows:

> "Eighth, Congress used the words '*may* be substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act." 370 U.S. at 323.

Under this test, probability of an anti-competitive effect is sufficient but the mere *possibility* is not. In the present case, unless the record discloses that there is a *probability* that CIG, without the Northwest Division assets, would constitute a significant competitive factor in one or more of these market areas, the acquisition cannot be condemned as substantially lessening competition.

A vital element of ability to compete is the likelihood that a would-be competitor could meet the requirements of Section 7 of the Natural Gas Act, (15 U.S.C. §717f (1958)), to obtain a certificate of convenience and necessity. These requirements include an unserved market, adequate reserves to serve such market and financial ability

to provide the required facilities, all at a price which would make service to the market economically feasible.

At page 23 of its Jurisdictional Statement appellant makes these statements without reference to any supporting evidence in the transcript:

> "Clearly, on the undisputed and objective facts, CIG is a potential competitor of the California market * * * CIG has immediate access to the vast reserves of the Wyoming basins, part of which it relinquished on the failure of the Rock Springs project and it can, with comparative ease, reach reserves in other areas of the Rocky Mountain region."

Appellant makes no attempt to show any probability that CIG, alone, could secure a Federal Power Commission certificate to serve California. The record shows that there are no "vast" proven Wyoming reserves not already committed (Tr. 3006, 3094-5, 9434)[4] and that CIG cannot reach reserves "in other areas of the Rocky Mountain region" unless it acquires the Northwest Division line which traverses these other areas (Tr. 2876-8; 3006-8). Appellant's assumptions are further controverted by undisputed evidence referred to below.

Peter J. King, Jr., a senior vice president of CIG, and Thomas L. Pelican, also a senior vice president of that corporation and president of its pipeline division, both testified, without contradiction, regarding the past, present and future capabilities of CIG to compete in California and other markets.

CIG has never attempted to compete in the area served

4. Dr. Haum testified that in the Green River Basin only 7.9% of the area had been drilled to the extent of one or more wells per square mile and only 5.794 trillion cu. ft. of gas had been discovered by 1968 (Tr. 9434).

by the Northwest Division including western Colorado, Utah or the territory beyond to the Pacific Coast (CIG Ex. 4, Tr. 2642, 2647-2648, 2650, 3096) nor, by itself, in California.

Geographic barriers and lack of significant market growth in the areas of Utah and western Colorado now served by the Northwest Division preclude any probability that CIG and New Company would be competitive there (Tr. 2650, 2659, 2661, 2983).

CIG made one unsuccessful effort to enter the California market in 1958 by participation in the Rock Springs project. This was motivated by a then existing burdensome excess gas supply which does not exist today. (Tr. 2554-2556, 2964-2965, 2971). Certificates of convenience and necessity for this project were ultimately denied by the Federal Power Commission in 1963 (Tr. 2555-2556). Since then CIG has been unable to make any further attempt to enter the California market. Subsequently, however, two new pipeline companies of major size, Transwestern and Pacific Gas Transmission, have been certificated to serve and are serving California (Tr. 2598-2599).

Although CIG's financial condition has improved materially (Tr. 2550, 2552) it still is unable to undertake a pipeline project to California alone because it does not have the gas reserves nor access to gas supply areas to support a California project without the Northwest Division (Tr. 3006-3008). We quote from cross-examination of Mr. King by counsel for Southern California Edison Company:

"Q. Now, I don't want to get into anything extended

on this, but you have stated your opinion that CIG could not compete for the California market now, and I just want to be certain that I understand. When you say 'now,' you mean now that you don't have the gas or what-not to go to California tomorrow, but — or do you mean absent the acquisition of New Company in your opinion, you would be unable to go into a program looking toward an expansion to California over the next few years?

"A. Absent the acquistion of New Company in my mind, we would be unable to undertake such a program.

"Q. Could you give me briefly the basis for your reasoning on that?

"A. Certainly today we don't have the gas supply, and absent the acquisition of New Company, we don't have available to us the wide range of gas supply areas that a combination provides, and in my opinion, if New Company is going to be the vehicle of competition to California, it is going to have to look to this whole range of supply sources to assemble the gas to make the project feasible." (Tr. 2876-2878)

The principal markets of the Northwest Division are at the western end of the line (CIG Ex. 4; Tr. 2642, 2648) and, although there is a growing demand for natural gas in that area the foreseeable increments are not substantial enough to warrant construction of a pipeline to that area from CIG's present system (Tr. 3110-3111). This is recognized by appellant in its Jurisdictional Statement:

"Appellant concedes that the record does not disclose whether a new project to serve the incremental demand of the Pacific Northwest with Wyoming-Rocky Mountain gas is feasible now or in the immediate future." (J.St. 31)

CIG does not have a sufficient gas supply to serve in

that market (Tr. 3096) and supplies of natural gas for that area are more readily available from Westcoast Transmission Company, Ltd., a Canadian pipeline company whose line terminates at Sumas, Washington,[5] Pacific Gas Transmission Company which presently has a line traversing Washington and Oregon, and Alberta Natural Gas Company with a line terminating at the Canadian-Idaho border (El Paso Ex. 1, Tr. 63). There is nothing in the record to indicate a probability of competition from any other source which would be eliminated by CIG's acquisition of El Paso's properties. Therefore, there could be no lessening of competition.

No party participating in the trial foresaw even a possibility that the Northwest Division would seek to compete in CIG's market east of the Continental Divide and appellant makes no such contention.

Finally, appellant's contention that the CIG acquisition lessens competition for Wyoming reserves is unsupported by the record and is not an issue within the mandate of the *Cascade Natural Gas Corporation v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967). First, this argument assumes the existence of known uncommitted reserves. The evidence shows there has not been enough drilling in this area to determine the extent of the Wyoming reserves or the feasibility of their recovery (Tr. 3006, 3094-3095, 9434). Second, this argument completely ignores the point that the heart of this case involves competition to California consumers, not competition for unknown reserves of Wyoming gas fields, which

5. Westcoast was a competitor for the FPC certificate to serve the Northwest area which was awarded to Pacific Northwest Pipeline Corporation. (Tr. 2553)

was not even considered in *Cascade, supra,* or in earlier decisions of this Court relating to this divestiture.

Appellant contends that the proposed acquisition by CIG will create further concentration of monopoly power. There has not been a concentration of competitors in either the California natural gas market or that of the Northwest or Utah-Colorado through elimination of prior competitiors as was the case in *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963); *United States v. Von's Grocery Co.,* 384 U.S. 270 (1966), and *United States v. Pabst Brewing Co.,* 384 U.S. 546 (1966), and other cases relied upon by appellant. In fact, when the Government commenced this action against El Paso, it was the only important interstate pipeline west of the Rocky Mountains. *United States v. El Paso Natural Gas Co.,* 376 U.S. 651, 658-659, 661 (1964). At the present time there are three, each of which is far more powerful than CIG and the Northwest Division would be after divestiture (CIG Ex. 2, Tr. 2598-2599). It is absurd to contend that creation of such a fourth competitor in that market in accordance with the mandate of the Supreme Court will tend toward a monopoly. The virtual monopoly enjoyed by El Paso respecting service to the Pacific Northwest cannot be furthered or increased by the substitution of a smaller, less powerful CIG and hence there can be no furtherance of monopoly power therefrom.

On the issue of alleged concentration of power in the natural gas industry, CIG's Exhibit 2 is important. It is there shown that, in gross utility plant, CIG ranks 28th, slightly over 1/10th the size of the largest company. The Northwest Division ranks 17th and, in combination, the

two systems would be 10th in the nation and less than ⅓rd the size of the largest company. In gas sales volumes, CIG is 19th and the Northwest Division is 23rd. Together they would be 11th, with less than ½ the sales volume of the largest company. Gross revenues of CIG put it in 27th place and gross revenues of the Northwest Division were 20th. Gross revenues of the combined systems would be 14th in the entire industry and would amount to less than ½ those of the largest company (CIG Ex. 2, pp. 1-3; Tr. 2595-2599).

Appellant's Argument on the Countervailing Power Doctrine Is Without Merit

In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), this Court examined the intent of Congress in adopting the 1950 amendments to Section 7 of the Clayton Act. The following relates to "countervailing power":

> "Fifth, at the same time that it sought to create an effective tool for preventing all mergers having demonstrable anticompetitive effects, Congress recognized the stimulation to competition that might flow from particular mergers. When concern as to the Act's breadth was expressed, supporters of the amendments indicated that it would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market, nor a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market. . . . Taken as a whole, the legislative history illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." 370 U.S. at 319, 320.

"The importance which Congress attached to eco-

> nomic purpose is further demonstrated by the Senate and House Reports on HR 2734, which evince an intention to preserve the 'failing company' doctrine of *International Shoe Co. v. Federal Trade Com.*, 280 U.S. 291, 74 L.Ed. 431, 50 S. Ct. 89. Similarly, Congress foresaw that the merger of two large companies or a large and small company might violate the Clayton Act while the merger of two small companies might not, *although the share of the market foreclosed be identical, if the purpose of the small companies is to enable them in combination to compete with larger corporations dominating the market.*" 370 U.S. at 331. (Emphasis added.)

The above quotations demonstrate that if competition will be enhanced or not substantially lessened the combination will not be prohibited even though one or more competitors might suffer. The "countervailing power" doctrine which appellant condemns (J.St. 20 *et seq.*) was recognized by Congress and by the Supreme Court in *Brown Shoe Co., supra.*

Since there is no probability of a substantial lessening of competition or tendency to create a monopoly from CIG's acquisition, resort to the countervailing power doctrine is not required to support the judgment. However, if the doctrine is applicable to this case, the District Court correctly applied it as shown by the quotations from the *Brown Shoe Co.* decision above. Although no contention is made that a New Company controlled by another applicant would be "failing," such a New Company could not re-establish effective competition in the California market to the economic extent and with the speed required by *Cascade, supra.* Therefore, the intention of Congress and the mandate of this court would be ac-

complished most effectively by the acquisition by CIG of the Northwest Division.

Appellant cites *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), and *United States v. Continental Can Co.*, 378 U.S. 441 (1964), as authority for the statement that the Supreme Court has consistently rejected the countervailing power defense to a Section 7 violation (J.St. 20-22). In each of those cases, the facts amply demonstrated that each of the combining parties had such a substantial position in the relevant market that it did not need the added strength of a combination to compete more effectively. In *Penn-Olin*, *supra*, although neither of the joint venturers had built a plant to supply the relevant market prior to formation of the joint venture, each of them had full capability of doing so and competing effectively without the combination. Therefore, none of these cases is relevant here.

The Findings of No Substantial Anti-Competitive Effect Are Sustained by the Record

The findings of the District Court that CIG should not be disqualified for anti-competitive reasons appear in the Appendix to Appellant's Jurisdictional Statement at pages 98-102.

The court's findings are supported not only by the uncontradicted testimony of Messrs. King and Pelican,[6] but by the record as a whole which demonstrates the enormity of the task of CIG, or any other entity, alone obtaining the substantial additional gas supply and financing which would be required merely to apply to the

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6. See pages 17-20, *infra*.

Federal Power Commission for a certificate to construct a new pipeline to California.[7] These burdens, and the substantial risks involved, support the testimony of CIG's witnesses that CIG alone could not attempt to enter the California market or the market areas of the Northwest Division. Therefore, the District Court was not compelled to rely solely upon the alleged subjective statements of CIG's senior officers. The underlying facts upon which their opinions and intentions were based fully sustain them. Appellant's contention that CIG, alone, was ever, or may now be, a potential competitor in the California market is palpably erroneous and not supported by the record.

The District Court was correct in construing the mandate of this Court to require that the strongest possible applicant should be selected to provide effective competition in the California market and the court's findings that the acquisition by CIG of El Paso's Northwest Division will not substantially lessen or eliminate competition in any of the relevant markets should be sustained. On the record, there is no probability of either a lessening of competition or a tendency toward monopoly and the test of a Section 7 violation laid down in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), has not been met.

This Litigation Must Be Terminated

Appellant has chronicled on page 6 of its Jurisdictional Statement the problem of legal amputation of a major

7. A minimum of three trillion cubic feet of reserves would be required and the estimated capital requirements for a minimum pipeline project from San Juan to California was stated to be $93,000,000 (Tr. 2664-2665). Tennessee Gas Transmission Company expended over $9,000,000 in an unsuccessful effort to obtain Federal Power Commission approval for a line to Southern California (Tr. 2601, 2796).

segment of El Paso's natural gas transmission system, which has existed for nearly fifteen years as the sole supplier of natural gas to the Pacific Northwest region, and the placement of that segment of El Paso's system in sufficiently strong hands to pose a practical threat of competition in California which has been the subject of continuous litigation for nearly thirteen years. Appellant's current effort stands as the *fourth* time that this case has been brought before the Supreme Court of the United States. The three prior cases are:

> *California v. Federal Power Commission*, 369 U.S. 482 (1962);
>
> *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964);
>
> *Cascade Natural Gas Corporation v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

The time has come to end this proceeding so harmful to the distributing companies and consumers in the Pacific Northwest who are the innocent victims of this litigation. These companies and their customers are solely dependent upon the owner of the pipeline serving the Pacific Northwest for their supply of gas. They need and are entitled to have their gas supplier finally determined and the cloud of nearly thirteen years of litigation removed.

The heart of the natural gas business is a pipeline supplier sufficiently qualified and motivated to assure the distributing companies and their customers of an adequate gas supply.

The record before the District Court clearly portrays the expansion in the demand for natural gas in the Pacific Northwest area during this period of litigation, and es-

tablishes the critical nature of the supply situation as it existed up to the end of the hearings in March of 1968 (Tr. 8883-8887, 8904-8905). This growth in demand for natural gas was correctly projected to continue.

In the face of a compelling and continuous need for substantial expansion of gas reserves available to the Pacific Northwest area and the expenditure of millions of dollars for additional facilities to make such gas available locally, El Paso's capabilities have been restricted year after year by the continuing threat and pendency of its obligation to divest itself of the entire network of transmission lines and related facilities supplying the Pacific Northwest. It was in recognition of the serious interests of such intervenors as Cascade Natural Gas Corporation, as well as the customers of El Paso in California, that this court, in *Cascade, supra,* established the right of such intervenors to participate in the formulation of a proper divestiture plan and order, without delay.

If probable jurisdiction be noted, extensive further delays will result before a final decision is rendered which could include another remand to the District Court. Such a result would create grave practical and legal problems. Are we to go through another two years or more of divestiture proceedings before this Court, the District Court, and the Federal Power Commision, thus continuing El Paso's illegal acquisition? What assurance is there that any of the other eight applicants for acquisition before the District Court are still in existence, let alone still interested? What assurance is there that another applicant could meet the test of *Cascade, supra,* and also satisfy appellant's position that the applicant selected by the court shall locate its

headquarters in Salt Lake City? What assurance is there that another applicant would satisfy the California intervenors or those from the Pacific Northwest? Finally, what assurance is there that a different applicant could survive still another appeal to this Court by a dissatisfied intervenor? We respectfully suggest the above be considered while this Court is reviewing the matter of probable jurisdiction.

Twenty-four direct parties to the litigation have been given full opportunity to present such affirmative case as they care to, in opposition to the selection of CIG. Only one of them, as we have heretofore pointed out, has seen fit to express its dissatisfaction with the selection. All, with the one exception, are now in accord with the District Court's decision: the consumers to the North, the consumers to the South, the state regulatory commissions and the federal government.

Manifestly, the degrees of satisfaction with the District Court's decision will differ, and it will always be so as to any decision which seeks to satisfy such a multitude of diverse interests. These individual interests cannot be indulged indefinitely. We are dealing here with a dynamic demand for a commodity supplied by an industry regulated in the public interest—a demand that is voracious. The predominant, the imperative, the over-riding, the really *substantial* requirement of the moment is the finalizing of the divestiture at the earliest possible moment so that the immediate and future needs of the Pacific Northwest which has suffered through years of indecision resulting from this litigation, and the burgeoning new demands of the California market for more gas, can be met. That over-riding requirement extends geographically

throughout the entire West from the Canadian to the Mexican borders, and it must be given priority consideration.

CONCLUSION

We respectfully submit that divestiture has been accomplished by the District Court in meticulous compliance with the mandate of this Court in *Cascade.* We urge the Court that it affirm the judgment or dismiss the appeal so that there can now be final divestiture without further delay.

Respectfully submitted,

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Northwest Natural Gas Company
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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION, APPELLANT

v.

EL PASO NATURAL GAS COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to the Court's order of April 21, 1969, inviting the Solicitor General to express the views of the United States with respect to the motion of appellant to dismiss the appeal under Rule 60 of the Rules of this Court.

The United States has no objection to the granting of the motion to dismiss the appeal. For the information of the Court, there is reproduced, as an appendix to this memorandum, the Motion to Affirm the judgment of the district court which we had prepared as a response to the appellant's Jurisdictional Statement and which was about to be sent to the printer when the appellant moved to dismiss its appeal. It then became our understanding that no Motion to Af-

firm would be received. The Motion is now submitted, without change.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1969.

APPENDIX

In the Supreme Court of the United States

October Term, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION, APPELLANT

v.

EL PASO NATURAL GAS COMPANY, ET AL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

In *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, this Court held that the acquisition in 1957 of the stock and assets of Pacific Northwest Pipeline Corporation by El Paso Natural Gas Company (hereafter "El Paso") violated Section 7 of the Clayton Act, because it might substantially lessen competition in the sale of natural gas in California. It directed the district court "to order divestiture without delay." 376 U.S. at 662. On remand, the government and El Paso entered into a consent decree which would have transferred the illegally acquired assets to a newly formed

company. This Court set aside the decree on the ground that it did not carry out the mandate of *El Paso,* and again directed divestiture without delay. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129. It also suggested guidelines for an appropriate decree.

These guidelines were (1) that the gas reserves to be divested should be "no less in relation to present existing reserves than Pacific Northwest had when it was independent; and the new gas reserves developed since the merger must be equitably divided between El Paso and the New Company," 386 U.S. at 136–137; (2) that the district court determine whether the new company would need the proceeds of the sale of the stock of West Coast Transmission Co., which El Paso had acquired in the merger, in order to have the resources necessary to compete in the California market and whether the new company should receive remuneration for El Paso's use of some $53 million in tax loss carry-overs acquired from Pacific Northwest, 386 U.S. at 138; and (3) that conditions must be imposed to make sure that the new company would be completely independent of influence by El Paso, conditions which might possibly include a sale of the stock of the new company to outside interests, 386 U.S. at 141.[1]

The basic properties to be divested are the former properties of Pacific Northwest Pipeline Corporation, which after the illegal acquisition became El Paso's Northwest Division. The Northwest Division operates some 1500 miles of pipeline running northwest from Durango, Colorado to its principal markets in Wash-

[1] The Court also ordered that a different district judge be assigned to conduct the additional hearings. 386 U.S. at 142–143. Pursuant to this direction the proceedings on remand were conducted by Judge Chilson.

ington, Oregon, and Idaho.[2] It has assets of $252.6 million, 1968 sales of slightly more than $120 million and estimated 1968 net income after federal taxes of $8 million. (El Paso Divestiture Plan, pp. 4–5, 10, tab. 13.)

On the second remand twenty-two parties intervened, including state utility commissions and interested gas and electric companies, and nine firms sought to acquire the Northwest Division properties. The district court chose Colorado Interstate Gas Co. (now known as Colorado Interstate Corp.; hereafter "CIG") (J.S. App. 37–130).[3]

CIG is a growing corporation with assets in excess of $260 million. Its original business was the operation of a natural gas transmission system on the eastern slope of the Rocky Mountains, but it has recently diversified into petroleum, fertilizer and machinery enterprises. Its principal gas market is in the Denver-Colorado Springs area. Eighty percent of its gas comes from the Anadarko (Hugoton and Panhandle) Basin in Kansas, Oklahoma and Texas, east of the Rocky Mountains, although it also draws some gas eastward from Wyoming fields. In 1966 it had operating revenue of $155 million, 48 percent of which was derived from pipeline operations, and a net income of $12,600,000. Between 1952 and 1966 CIG's gas sales have approximately doubled and its gas

[2] The Northwest Division also serves these markets with gas supplies drawn from Canadian sources through a connection at Saumas, Washington and through Pacific Gas Transmission lines at Kingsgate, Idaho. The Division also has smaller customers in Colorado, Wyoming and Utah.

[3] The court distributed a tentative opinion on June 21, 1968, and permitted parties to make objections to its findings and conclusions (J.S. App. 37–124). On August 29, the court slightly modified its opinion and made its decision final (J.S. App. 125–128). On November 7, it granted El Paso's timely motion to amend the judgment to permit El Paso to retain certain non-utility investments it had obtained in the merger (J.S. App. 129–130).

revenues have increased from $18 million to $74 million. In that period it has made approximately $172 million worth of improvements to its pipeline systems. (Tr. 2549–2552, 2650; CIG Divestiture Plan, pp. 18–19, Ex. 1.)

CIG has never independently attempted to supply the Northwest or California markets. In 1958, however, it joined with El Paso in the so-called "Rock Springs" project, in which it proposed to supply gas which El Paso would sell to its California customers. CIG at that time had a serious problem of oversupply while El Paso was seeking Rocky Mountain reserves to supply its rapidly expanding Southern California market. CIG was to construct a 155-mile line from its existing terminus near Rock Springs, Wyoming, to Provo, Utah, where it would connect with a line to be constructed by El Paso southwest to the California border. The Federal Power Commission rejected the application on the ground that no immediate need for new pipelines had been shown, that other ways of bringing gas to California were less costly and that other alternatives were available for expansion to meet future California market needs. 30 F.P.C. 77 (Tr. 2555–2556).

None of the eight other applicants for acquisition operates a natural gas pipeline. All had been formed for the purpose of acquiring the Pacific Northwest properties, although one of them, the Rosenblatt-Husky Group, includes Husky Oil Company, an operating oil producer (Tr. 6575–6578). Each of these applicants submitted proposed plans for divestiture, six of which contemplated meeting the new company's working capital needs out of the proceeds of the West Coast Transmission stock. (See J.S. App. 57–64.)

As a standard for selection, the court declared that it should choose the applicant that is "best qualified

to make New Company a serious competitor" in the California market (J.S. App. 96). It found that entry into the California market would be much more difficult today than in 1957 because of (1) El Paso's growth, (2) the entry during this period of an additional out-of-state supplier into both the Southern and the Northern California markets, and (3) the possible consequences of pending Federal Power Commission proceedings for construction of new pipelines from Texas to California (J.S. App. 94–96). It therefore believed that, "[b]ecause of the present competitive situation, time is of the essence" (J.S. App. 97).

The court chose CIG because it was "the only applicant which has a presently functioning organization with experienced management and personnel which gives it the capability to restore New Company to a competitive position in a much shorter period of time than could be done by any other applicant" (J.S. App. 97). It held that CIG was not disqualified as a potential competitor in California because "CIG, standing alone, has little chance of affecting competition for the California market * * *" (J.S. App. 101). On the other hand, the court found that "of the alternatives available, the combination of CIG and the New Company will create the strongest competitive potential for the California market" (J.S. App. 101).

Pursuant to the court's directions, El Paso and CIG negotiated agreements to implement the divestiture plan.[4] El Paso is to divest Northwest Pipeline Corporation ("New Company"), to which it will transfer all the operating facilities, reserves, and

[4] These agreements were approved by the district court on November 7, 1968, in an order overruling objections to the Implementing Documents. The Implementing Documents are included in the record.

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other assets to be divested (Implementing Documents, "Agreement," pp. 2–3, 9–11, 14–15).[5] El Paso will receive five million shares of New Company non-voting preferred stock which can be converted to CIG common stock after a period of five years (*id.* at 7).[6] CIG will acquire all of the New Company's common stock in exchange for $5 million in cash and approximately 1,750,000 new shares of CIG common stock to be held by the New Company to cover the conversion rights of the New Company preferred to be issued to El Paso (*id.* at 8, Ex. III).

The agreements contain detailed provisions to insulate both the New Company and CIG from El Paso control. The New Company preferred stock may not be converted into common stock by El Paso, by its affiliates or by officers or directors thereof; by persons who own, control or have power to vote in excess of ½ of 1 percent of the outstanding El Paso common stock; by members of the immediate family of any officer or director or of any such person; or by persons acting in their behalf or in concert with them. In addition, no officer or director of El Paso or its affiliates may purchase or retain more than 1/10 of 1 percent of the outstanding common stock of CIG or New Company for a period of ten years; and no person who individually, or together with members of his immediate family or with any other person with whom he is in concert, owns or controls more than ½ of 1 percent of the outstanding common stock of El Paso

[5] The New Company will assume the Northwest Division's pro-rata share of El Paso's system-wide bond and debenture indebtedness; as of Dec. 31, 1967, this was approximately $170 million (El Paso Plan, p. 11 & tab. 17; Implementing Documents, "Agreement," pp. 6, 11–12).

[6] The preferred stock will pay a dividend of $1.20 per year for the first five years and $1.00 per year thereafter (Implementing Documents, "Agreement," p. 7).

may own more than 5 percent of the outstanding common stock of CIG. El Paso and its affiliates are prohibited from acquiring any CIG or New Company stock subsequent to the divestiture. Finally, El Paso is prohibited from having common officers or directors with New Company or CIG. (Implementing Documents, "Restrictive Provisions," pp. 1–5.)

Under the plan, El Paso will transfer to the New Company some 9.2 trillion cubic feet of gas reserves, with a 27-year reserve life index and a 12-year deliverability life, from Canadian, Rocky Mountain, and San Juan Basin sources (J.S. App. 67–69). The court determined that the 21.8 percent of the San Juan Basin reserves that El Paso will divest to the New Company, were "no less in relation to present existing reserves than [Pacific Northwest] had when it was independent * * *" (J.S. App. 76). The court also noted that the New Company will receive more than 50 percent of the net additions to the reserves developed since the acquisition (J.S. App. 76). While the court recognized that the total reserves of the New Company would not themselves be sufficient to meet both the Northwest Division's existing requirements and those of a California project, it concluded that reduction of the reserves dedicated by El Paso to its Southern Division would be inequitable (J.S. App. 77–78). The court found that under CIG's experienced management the New Company could obtain additional reserves from other sources "to support its competition in the California market" (J.S. App. 81).

El Paso also had acquired from Pacific Northwest substantial investments, including substantial numbers of shares of the stock of West Coast Transmission Company, a Canadian company supplying gas to Pacific Northwest, and of Northwest Production Company,

a production company operating in the San Juan Basin and the Permian Basin; and various other properties and investments, including the Northwest Division's headquarters building in Salt Lake City and a 49-percent stock interest in Phillips Pacific Chemical Company, a fertilizer company. Since CIG did not want the West Coast Transmission or Northwest Production Company stock and since it can independently supply the New Company with working capital, the court did not require El Paso to divest these stocks to CIG. It did, however, require El Paso to dispose of these stocks to a satisfactory purchaser, because both of these companies supply gas to the New Company. (J.S. App. 83–84.)[7] The court ruled that the New Company should not be reimbursed for the tax losses acquired by El Paso since these had "in great measure" been passed on to customers of the Northwest Division in the form of lower rates (J.S. App. 84–86).

Following the decision of the district court, El Paso and the New Company filed applications with the Federal Power Commission for permanent certification of the New Company to operate the Pacific Northwest facilities. FPC Docket CP–69–67, *et al.* At a Commission hearing on December 11, 1968, where there was no opposition to the certification, CIG stipulated to operate the New Company under its present rate and tariff structure and to refund any revenues collected above the level subsequently determined to be legal by the Commission in a separate rate proceeding. The New Company's principal customers have agreed to this arrangement.

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[7] The court permitted El Paso to retain its investments in the realty company which owns the Northwest Division headquarters building in Salt Lake City and in Phillips Pacific Chemical Co. (J.S. App. 129–130).

At the Commission's hearings it was announced that the New Company and CIG have agreed with the principal wholesale gas buyers in the southern California area that the New Company will attempt to develop a project for delivery of gas to California by November 1973.[8] The agreement provides for feasibility and engineering studies, permanent commitments if the project is feasible and other steps required to initiate the endeavor and obtain Federal Power Commission approval for it.

Argument

After extensive hearings the district court adopted a plan providing for the most expeditious divestiture presently possible of El Paso's illegally acquired assets. The terms of the divestiture plan fully comply with and implement the guidelines set forth in this Court's *Cascade* opinion (see the Statement, *supra*, pp. 4, 7-10). Indeed, the appellant does not contest those terms in any particular, but limits its challenge to the court's choice of CIG, rather than one of the other applicants, to acquire the Pacific Northwest properties. As we show below, on this record there is no reason to overturn that selection. The divestiture to CIG restores a major competitive force to the California market—which was the objective of the government's suit against the merger and of this Court's decisions in the case—and terminates this

[8] The agreement was with Southern California Edison Company, Pacific Lighting Company (which controls Southern California Gas Company and Southern Counties Gas Company) and the City of San Diego, and it has been disclosed to the Attorney General of California and the California Public Utilities Commission. A copy of this agreement, which is an exhibit in the Commission's proceedings, has been lodged by the government with the Clerk of this Court.

protracted litigation in time for the divested company to surmount the growing barriers to entry of the California market. Accordingly, the decree should be affirmed.

1. THE DIVESTITURE DECREE RESTORES TO THE CALIFORNIA MARKET A COMPETITIVE FORCE WHICH WAS ELIMINATED BY THE MERGER

The divestiture to CIG creates a strong new competitive force for the California market. The combination of the New Company and CIG will have the ability and resources to compete for new increments of demand in California.[9] In fact, following the decision of the district court, CIG entered into an agreement (see Statement, *supra,* p. 11) with the major users of natural gas in California specifying that the New Company will undertake the steps necessary to attempt a project for delivery of gas to California by November 1973. This agreement thus inaugurates a direct competitive effort by the New Company to serve that market. It also has the apparent approval of the California gas buyers, and the State itself—the interests most directly affected by the California competitive situation and which challenged in this Court the prior consent decree.[10]

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[9] As this Court recognized in *El Paso*, competition in the natural gas industry is not a struggle for current sales. Once a pipeline is constructed and certificated it will meet requirements for a very long period of time; the segment of demand thus satisfied is no longer subject to competition by other pipelines. Therefore, competition is limited to meeting new increments of demand as they emerge. See 376 U.S. at 659–660.

[10] Following negotiation of this agreement, the People of the State of California and Southern California Edison Co. withdrew their notices of appeal and the Southern Companies (Southern California Gas Co. and Southern Counties Gas Co.) have filed a motion to affirm.

Since there was no opposition before the Federal Power Commission to the New Company's application for permanent certification to operate the Northwest Division, it seems likely that the Commission will issue such a certificate soon after the termination of this litigation (F.P.C. Docket CP 69-67) and the New Company can then promptly begin work on its commitment with respect to a California project. But if the case is again remanded for additional litigation, the likelihood that any purchaser will be able to attempt entry into California will be greatly diminished because of the changing market situation (see *supra*, p. 7; *infra*, pp. 14–15) and the substantial time needed to mount a project.

Despite the fact that the divestiture decree creates a strong new competitive force for California, appellant's principal argument is that the decree should be set aside because it will adversely affect competition (between CIG and the New Company as potential competitors) in the California market (J.S. 20–26). It is difficult, however, to see what interest the appellant has in the alleged effect of the decree in the California market. The appellant does not show how it, the State of Utah, or any of that State's citizens or residents would be adversely affected by the decree's alleged foreclosure of competition in California.

The government argued below that CIG should be considered a potential competitor for the California market since it has gas reserves in the Rocky Mountain basins, it was an established, experienced, conservatively financed company, and it apparently had the incentive to enter California. See *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 172–177. As the district court found (J.S. App. 101), however, other

considerations make independent entry by CIG into California speculative and in any event much less likely than in conjunction with the New Company. CIG has diversified into other fields (see CIG Divestiture Plan, Ex. 1, pp. 2, 6–10), and the Federal Power Commission imposes limitations on the rate of return in pipeline operations. Furthermore, substantial expenditures are necessary before a proposed project can be submitted to the Commission, and this investment will be lost if the project is disapproved. These factors reduce the incentive for CIG to propose a California project, and, with the exception of the unsuccessful Rock Springs venture with El Paso, CIG has not in the past sought to do so.

The changes in the California market which have occurred since El Paso acquired Pacific Northwest further limit the attractiveness of that market to a potential competitor. At that time, El Paso was the only out-of-state natural gas supplier in the California market. Today, California is supplied by three strong interstate pipeline companies: El Paso, Transwestern Pipeline Company and Pacific Gas Transmission Company.[11] In addition, the Federal Power Commission recently authorized El Paso to construct new pipeline facilities which will enable it to bring additional natural gas into California and has authorized Pacific Gas Transmission to bring additional Canadian gas to Northern California (F.P.C. Docket CP 67–187, *et al.* (October 30, 1968)). Transwestern

[11] This change in the California market was noted by this Court in *El Paso* as evidence of the opportunities which would have existed for Pacific Northwest had it not been acquired by El Paso. 376 U.S. at 661.

also has a pending application to deliver additional gas to California (F.P.C. Docket CP 67-181).[12]

In these circumstances, CIG's somewhat dubious effectiveness as a potential competitor in California did not conclusively disqualify it as an applicant, in view of CIG's submission that a combined CIG-New Company would be significantly more likely actually to compete for entry into the California market than would either company standing alone. Although, as we said below, we believe that the district court's findings should have reflected a more searching comparison of the merits of all the applicants, we do not believe this decree warrants plenary review by this Court. The agreement with the California interests, subsequent to the court's decision, and their apparent satisfaction with the divestiture, indicate that the overriding public interest in promptly restoring competition for the California market will best be served by affirming this decision.

2. THERE IS NO FOUNDATION IN THE RECORD FOR APPELLANT'S SUGGESTION THAT THE DECREE MIGHT HAVE SIGNIFICANT ANTICOMPETITIVE EFFECTS IN ANY OTHER MARKET

The appellant questions the effect of the selection of CIG on competitive conditions in the sale of natural gas in Utah and western Colorado (J.S. 30–31) and in the acquisition of gas reserves in Wyoming (J.S.

[12] These increments are expected to meet California's near term demand but not its projected long term requirements (see opinion of Chairman White, dissenting in part, Docket CP 67-187). However, projections as to new increments of demand for the mid and late 1970's are uncertain and must be discounted in some degree by the possible construction of nuclear power plants and a possible slowdown in the rate of California's growth.

27–30). The former contention clearly relates to the appellant's interest as an intervenor in this case. But the appellant offered no evidence in the district court relating to the probable effects of the decree in the Utah market and can point to no basis in the record or in the district court's findings for its present contention.[13] In the absence of record support for appellant's speculative assertions concerning possible future effects of the decree in the Utah market, there is no reason to displace the district court's considered judgment that the transfer of the properties to CIG will best effectuate the overall purpose of the lawsuit in restoring Pacific Northwest as a viable competitor in the California market.

Appellant's interest in the possible lessening of competition between CIG and the New Company for gas reserves in Wyoming is less apparent, in view of the fact that competition among buyers tends to raise, rather than lower, prices.[14] It is possible that appellant's concern here (which is not disclosed in the Jurisdictional Statement) is with the possibility that the decree might have an adverse effect on the devel-

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[13] Mountain Fuel Supply Company, the principal supplier in Utah, provides approximately one-third of its needs internally, purchases another third from other producers, and obtains the remainder from pipeline companies, including CIG and the New Company (Mountain Fuel Supply Company, Annual Report for 1966, pp. 2–8). Mountain Fuel's purchases from CIG are insignificant, however, and are made under a short-term contract which expires in 1969 (Tr. 2648, 3071, 3187). By contrast, in 1968 it purchased over $4.5 million worth of gas from New Company. Mountain Fuel, which is a party in the present case, has not objected to the proposed divestiture plan.

[14] See, generally, *Permian Basin Area Rate Cases*, 390 U.S. 747, 793. The Federal Power Commission has established maximum prices for the Wyoming reserves. *Humble Oil & Refining Co.*, 24 F.P.C. 191 (1960), reaffirmed in *Western Transmission Corp.*, 31 F.P.C. 1295 (1964).

opment of gas reserves in Wyoming which could be used to serve consumers in Utah. Once again, however, the appellant offered no evidence in the district court to indicate that the decree might have such an effect. On the present record, it is at least equally plausible to infer that the planned project of CIG and the New Company for entry into the California market will provide greater incentive for acquisition of new gas reserves in Wyoming than would any presumed possible competition between CIG and the New Company.[15]

Conclusion

Appellant has not provided any factual basis in this record for its claim that the combination of Pacific Northwest and CIG will have an adverse effect on competition in those markets in which it has a valid interest. The divestiture approved by the district court would create a strong and viable potential competitor for the California market upon terms that meet the standards for divestiture announced by this Court in *Cascade*. Appellant's speculative and conjectural claims of competitive injury in other markets provide no basis for overturning the district court's considered judgment that the acquisition of Pacific Northwest by CIG provides the best prospect for restoring in the California market the competition that was eliminated almost twelve years ago by the illegal merger. The judgment of the district court

[15] There is, moreover, no indication in the record that CIG has any history or prospect of competing in the Northwest market. Because of the proximity of large supplies of Canadian gas and FPC area price rulings, Rocky Mountain gas is not competitive in the Northwest. (Tr. 3088–3089.)

approving the divestiture plan should be affirmed.

Respectfully submitted.

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FEBRUARY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

IN THE

Supreme Court of the United States

October Term, 1968
No. 776

UTAH PUBLIC SERVICE COMMISSION,
Appellant,

vs.

EL PASO NATURAL GAS COMPANY, *et al.*,
Appellees.

On Appeal From the United States District Court for the District of Utah.

PETITION FOR REHEARING.

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Appellees.

On Appeal From the United States District Court for the District of Utah.

PETITION FOR REHEARING.

Southern California Edison Company (Edison), an Intervenor in the case below and an Appellee herein[1], prays that this Court grant rehearing of its decision of June 16, 1969, vacating the judgment of the United States District Court for the District of Utah and remanding the cause for further proceedings.

The Nature of Edison's Operations and Its Quest for Competition.

1. Edison is a public utility corporation which generates electricity and serves more than seven million people in southern California. Edison's steam electric generating plants require enormous volumes of fuel to

[1]Edison was an appellant in *Cascade Natural Gas Corporation, et al. v. El Paso Natural Gas Company,* 386 U.S. 129 (1967).

provide adequate service to its customers, and, operating under as strict air pollution control regulations as may be found anywhere in the country, its principal reliance for such fuel supplies is on gas. The existence of an adequate and reasonably assured supply of gas at a reasonable price thus is essential to Edison's ability to maintain reliable and economic electric service to the southern California public.

Edison is the largest ultimate consumer of gas in southern California. However, the gas service is rendered to Edison by its principal suppliers (Southern California Gas Company and Southern Counties Gas Company, subsidiaries of Pacific Lighting Corporation) on an interruptible basis, permitting such suppliers to suspend deliveries to Edison at any time or times and for such period of time as may be necessary for such suppliers to maintain service to their higher priority customers. Being in the class of customers served at lowest priority, Edison is among the first to feel the impact of any decrease in gas supplies to the area, or the impact of any inability of the gas suppliers to obtain additional volumes of gas to meet the increasing needs of the public in southern California. Because of its size, Edison sustains the principal brunt of any such impact.

For these reasons, Edison long and earnestly has sought additional competition by gas suppliers for its market in Southern California. The Edison market was in fact the focal point of the competition between El Paso and Pacific Northwest, which ultimately was

found to be suppressed by El Paso's acquisition of Pacific Northwest. The prior decisions in this matter (*United States v. El Paso,* 376 U.S. 651 (1964) and *Cascade v. El Paso,* 386 U.S. 129 (1967)) describe at some length Edison's operations and its early efforts to obtain competitive supplies of gas. Such efforts have continued to the present moment; they were the reason for Edison's appeal in *Cascade, supra,* and for its participation in this proceeding. Over the years Edison has spent large sums and made commitments literally into the millions of dollars in its efforts to obtain access to competitive suppliers, and it may safely be said that no one has more earnestly or industriously sought additional gas supply competition than has Edison.

Against this background, Edison submits that the Court's decision of June 16, 1969, will be harmful rather than helpful to the effort to obtain adequate competitive supplies of gas at a reasonable price and will have anti-competitive effects.

Edison Has Not Been Heard on the Merits.

2. This Court, which has so long and so carefully protected the rights of those appearing before it to a full and fair hearing, has in this solitary instance denied Edison (and others similarly situated) any hearing at all on the merits of the District Court decision. The notice issued by the Court put at issue only the motion to dismiss the appeal, and the motion of Mr. Bennett for a hearing. Edison deemed it unnecessary to argue that issue, but did advise the Court that it would have a repre-

sentative present in case the Court desired to question Edison relative to its position in the matter being heard. Had the Court given even the slightest indication that it intended to consider the decision of the District Court on the merits, and especially that part of the decision pertaining to the allocation of gas reserves, Edison certainly would have sought time for argument and the opportunity to file a brief. We could and would have pointed out in detail from the uncontroverted record the evidence (described briefly hereinafter) which conclusively establishes the potential for injurious consequences to Edison and other California consumers of any such reallocation of reserves as the Court apparently now contemplates. Whether we could have persuaded the Court to affirm the judgment of the District Court is beside the point: we at least would have had our day in court, and this Court would have been apprised of the critical fuel supply situation with which we are threatened by its present opinion, and, even if adhering to its present views, this Court then could, and we believe would, have been in a better position to have considered the wisdom of more specific provisions supplying at least the clarification we now seek by our alternative plea. While Edison is a corporate rather than an individual party, its rights to a full and fair hearing should be no less than those of any other party, particularly in this case where Edison speaks on behalf of the millions of southern California electric consumers who depend upon it for reliable and economic electric service as well as for itself.

A Reallocation of Gas Supplies Will Be Harmful Rather Than Helpful to Competition.

3. This Court's decision at least suggests, and may be interpreted to command, a reallocation of sufficient volumes of gas from El Paso to New Company to support an immediate new project to California. The evidence of record conclusively establishes that the minimum volume required for such a new project would be 300,000 Mcf per day, and that even that volume would produce an economically marginal operation. The Court's decision indicates that the reserves necessary to support such a new project volume are to be reallocated to the New Company from the San Juan Basin. The physical deliverability of San Juan reserves is notoriously low, and the volume of gas reserves required to sustain a deliverability of 300,000 Mcf per day from San Juan would be significantly greater than the volume of gas reserves required from fields with higher deliverability characteristics. The evidence of record establishes that the divestiture of such a reserve volume from San Juan would seriously jeopardize, and perhaps even destroy, El Paso's ability to meet its present contractual commitments for gas deliveries to Southern California.[2] Equally important, it could prevent the delivery of additional vol-

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[2]It is undeniably true that El Paso and its immediate customers (*not* including Edison) undertook these commitments and the Federal Power Commission authorized them with full knowledge of the pendency of this case, and despite repeated and vigorous protestation by Edison and others to the FPC and the courts (including this Court *e.g.*, Edison's Petition for certiorari in No. 1329 October Term 1967) that this very predictable consequence could obtain. It comes as cold comfort to Edison to be proven correct *now,* however, after all legal and practicable remedies have been exhausted. The only course of action which can save Edison and others now from such folly is continued maintenance of full, uninterrupted deliveries to California.

umes of gas by El Paso over and above its present contractual commitments for an extended and indeterminate period, since any new gas reserves El Paso may be able to acquire might be required to be devoted to making up the supply deficit for present commitments occasioned by the reallocation before expanded service could be authorized or implemented.

4. Whatever volume of reserves the District Court in this case may reallocate to New Company, no new pipeline to California can be built by New Company until it has obtained contracts for the sale of that gas, and has secured the necessary Certificate of Public Convenience and Necessity from the Federal Power Commission. Even after a certificate is issued by the Federal Power Commission as contemplated by this Court's decision, extensive and expensive facilities still must be financed and constructed. The time lag between the acquisition by New Company of such additional reserves from El Paso and the physical delivery of such supplies by New Company through new pipeline facilities to California thus will be extensive, and, although indeterminate in duration, could not possibly, it is believed, be less than two years.[8] It is not realistic to expect El Paso to be able to maintain from its gas supplies remaining after such a reallocation even the current level of its deliveries to California for such an extended period, much less to provide the additional increment of total supply to California which has been contracted for by Edison's suppliers and which is sorely needed. The Court's action thus threatens the California market, and Edison in particular, with the actual loss of

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[8]Absent almost instant action by FPC on New Company's application to serve California, the time lag will be appreciably longer.

substantial volumes of gas for an indefinite period of time. This loss could be permanent if New Company, despite its acquisition of such additional reserves and this Court's clear intent that they be sold to California markets, should not offer such gas to California markets on a non-discriminatory basis, or should fail to secure a certificate to serve California or financing on acceptable terms. In such case, the reallocated reserves, which were bought for service to California and dedicated to that service and which are to be divested solely to create competition in California, could be diverted from California to other markets to the permanent detriment of the California consumer. In Edison's considered opinion, this Court's present decision could well precipitate a critical gas supply crisis in southern California for at least the next several years, with Edison as the principal sufferer.

5. The decision of the District Court, based on a comprehensive record which clearly spelled out these consequences, assiduously sought an equitable solution which would provide New Company with the capacity to compete for new increments of supply to the California market, but would not destroy El Paso's ability to meet its present commitments or itself to compete for such new increments. If the objective sought is the maximum amount of competition, it is just as necessary to achievement of that objective to keep El Paso competitive as it is to make the New Company viable. Edison submits that the decision below, insofar as gas supply is concerned, did indeed provide an equitable solution, and did grant gas reserves to New Company no less than those previously available on a relative basis to the independent Pacific Northwest, in strict accord-

ance with the command of *Cascade*. The reallocation now required would not effectuate the *Cascade* mandate, but rather would prevent effective achievement of the objective of *Cascade*. The District Court decision should be reinstated in this respect. In the alternative, if this Court should deny rehearing, or determine upon rehearing to adhere to its present decision of June 16, 1969, Edison respectfully but most urgently submits that it would be of assistance to the lower Court on remand if this Court would clarify or expand on its views so as to indicate with greater specificity the manner in which its desire to protect the innocent California consumers, including Edison, from the dire consequences of a critical gas supply shortage are to be implemented. This can be done by affirmative instruction to the District Court to devise and to implement, on remand, such procedures and contractual or other commitments as may be necessary to prevent the temporary or permanent loss by the California market of any additional San Juan or other reserves reallocated to New Company in order to provide competition in California. Edison is satisfied that there are entirely feasible and practicable protective measures available which would achieve this result, and would not impede achievement of the objectives sought both by this Court and by Edison *i.e.,* more and more effective competition in the California market. Such an instruction would detract not a whit from the force of the present decision, if that is to stand, and would insure that the California gas consumers, the intended beneficiaries of that decision, will obtain such benefit without being burdened by the loss of supplies already committed to them. We, therefore, pray for the issuance of such more specific affirmative instructions, whether rehearing be granted or not.

Assumption by New Company of a Reasonable Amount of El Paso's Existing Debt Would Be Beneficial to Competition.

6. The Court's decision suggests, and may be interpreted to command, disallowance of the "assumption" by New Company of $170,000,000[4] of El Paso's indebtedness. The Court finds that this debt "assumption" (more commonly referred to on the record as a "roll over") "helps keep the two companies in league." The Court does not explain how such a "roll over" might keep the two companies in league, and it may be demonstrated that the Court's order, if not modified in this respect, could itself produce anti-competitive effects. As the record discloses, what in fact was proposed was the issuance of New Company bonds to present bondholders in exchange for El Paso bonds, which then would be cancelled and retired by the bondholders. At the end of the "roll over" the only association between the two companies would be that the same persons then owned bonds of each company. The fact is that those same persons now own and will continue to own bonds of other pipeline companies, and those same persons in major part will own bonds of both El Paso and New Company whether the "roll over" is accepted or New Company finances its acquisitions independently.

The money market for this type of security is essentially the same regardless of the identity of the issuer.

[4]This figure is approximate since it fluctuates with the retirement of existing debt and the addition of new debt by El Paso. Moreover, it was "pegged" by El Paso at the approximate level of the tax basis of the properties for tax reasons. With a cash sale, the reason for "pegging" it at the tax basis level may disappear. If the Court on rehearing permits a "roll over," the District Court should be directed to determine the appropriate amount.

New Company will have to raise debt capital under any circumstances, and in order to do so it must offer debt securities to substantially the same persons who now own debt securities of El Paso and of other pipeline companies, and who would have owned the debt securities "rolled over" if that had been allowed. All that the disallowance of the "roll over" accomplishes is a substantial increase in the interest rate payable on New Company's debt securities. It is common knowledge, of which the Court can take judicial notice, that interest costs are at the highest point in history. A new debt issue by New Company today would require an interest rate of approximately 9%; the composite rate available by means of the "roll over" should be in the order of 5¼%. The cost of capital is an integral part of the allowable reasonable return on investment of a pipeline company, and thus of its resulting rates to consumers. Higher capital costs thus can only impede rather than assist New Company in its effort to compete in the California market. At least this aspect of the plan of divestiture approved by the District Court should be reinstated.

Wherefore, Edison prays that the Court grant rehearing of its decision of June 16, 1969, affording all parties an opportunity to address themselves to the merits of the District Court's decision, and its compliance with the mandate of *Cascade;* in the alternative, Edison prays that the Court (1) clarify or supplement its opinion by instructing the District Court on remand to take such steps as may be necessary to prevent temporary or permanent loss to California of reserves dedicated to its gas supply service and (2) reconsider its decision relative to the "rollover" of a portion of the El Paso

debt and permit the assumption of a portion thereof by the New Company without the need for new financing at today's exceedingly high interest rates.

Respectfully submitted,

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Certificate.

I hereby certify that in my judgment the Petition for Rehearing is well founded and further certify that it is not interposed for delay.

ROLLIN E. WOODBURY.

Supreme Court of the United States

IN THE

Supreme Court of the United States

October Term, 1968
No. 776

UTAH PUBLIC SERVICE COMMISSION,
Appellant,

vs.

EL PASO NATURAL GAS COMPANY, *et al.*,
Appellees.

Affidavit of Proof of Service of Petition for Rehearing of Southern California Edison Company.

I, ROLLIN E. WOODBURY, being duly sworn, depose and say:

1. I am counsel of record for Petitioner, Southern California Edision Company, an intervener and party below, and a member of the Bar of the Supreme Court of the United States.

2. Each of the parties to the above entitled cause, pursuant to Rule 33 of the Rules of the Supreme Court of the United States, has been served with Petition for Rehearing of Southern California Edison Company by placing a copy thereof in an envelope addressed to each of the attorneys listed below for the Appellant and the Appellees at the addresses listed below and by depositing each such envelope in the United States mail

with air mail postage prepaid as to all addressed, and by placing a copy of the foregoing Petition in an envelope addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530 and by depositing said envelope in the United States mail with air mail postage prepaid.

3. Each of the other parties who have appeared in the cause entitled *United States of America, Plaintiff, vs. El Paso Natural Gas Company and Pacific Northwest Pipeline Corporation, Defendants,* in the United States District Court for the District of Utah, Central Division, Civil Action No. 143-57, has also been served with the foregoing Petition by placing a copy thereof in an envelope addressed to each of the attorneys listed below for such parties at the addresses listed below and by depositing each such envelope in the United States mail with air mail postage prepaid.

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Paul B. Cannon
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Salt Lake City, Utah 84111

Paradox Production Corporation:

C. Keefe Hurley
Earl Cooley
60 State Street
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Brigham E. Roberts
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Joseph Rosenblatt, et al.,—Husky Oil Company Group:

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Western States Pipeline Corporation:

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Phillips, Coughlin, Buell & Phillips
Electric Building
Portland, Oregon 97205

Dale E. Anderson
Fabian & Clendenin
Continental Bank Building
Salt Lake City, Utah 84101

4. A copy of the foregoing Petition has also been placed in an envelope addressed to each of the following and deposited in the United States mail with air mail postage prepaid:

The Honorable Hatfield Chilson
United States Courthouse
Denver, Colorado

Richard A. Solomon
General Counsel
Federal Power Commission
Washington, D.C. 20426

William M. Bennett
35 Evergreen Drive
Kentfield, California

John J. Flynn
954 Military Drive
Salt Lake City, Utah

I. Daniel Stewart, Jr.
2900 Millicent Drive,
Salt Lake City, Utah

DATED: This 8th day of July, 1969.

Rollin E. Woodbury

Subscribed and sworn to before me this 8th day of July, 1969.

Dona Mary Wilcomb
Notary Public in and for the
County of Los Angeles,
State of California

My Commission expires June 27, 1973.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION, APPELLANT

v.

EL PASO NATURAL GAS COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION FOR MODIFICATION OF OPINION

The United States moves that this Court modify that portion of its opinion in this case dealing with the exchange[1] of a pro rata share of El Paso's outstanding indebtedness for securities of the purchaser of the assets to be divested.

At page 7 of the slip opinion, June 16, 1969, the Court states:

> * * * Assumption of $170,000,000 of El Paso's indebtedness helps keep the two companies in league. The severance of all managerial and all financial connections between El Paso and the

[1] "Assumption" was the term used by the district court (J.S. App. 54) to describe what is in fact an exchange, or "rollover," of New Company-securities for El Paso bonds and debentures that completely terminates El Paso's liability on its bonds thus exchanged. We use "assumption" herein in the same sense that it was used by the district court.

New Company must be complete for the decree to satisfy our mandate. Only a cash sale will satisfy the rudiments of complete divestiture.

This language would appear to bar the district court from approving any divestiture plan under which a purchaser of the assets now held by El Paso's Northwest Division might reduce the purchase price by assumption of a portion of the relatively low interest obligations now owed by El Paso. Instead, the purchaser would be required to raise a substantial portion of the purchase price by borrowing cash at present high interest rates.[2] This threatens two undesirable effects. First, it may cause a substantial increase in rates to consumers in the Pacific Northwest presently served by the properties to be divested. Second, it may impair the New Company's ability to compete effectively in California by requiring it to charge correspondingly higher rates to consumers there so as to cover its increased interest costs.

Specifically, therefore, our motion is that the first sentence of the above-quoted language in the opinion be deleted, or, in the alternative, that that sentence be modified so as to permit the district court a measure of discretion with respect to the purchaser's assumption of a portion of El Paso's indebtedness. This mo-

[2] The Federal Power Commission has held that within limits of safety it is in the public interest for a pipeline to finance major percentages of its investment by debt rather than equity because the tax savings on the interest on the debt will reduce the cost of service and because the return on the equity component of its capitalization necessary to meet governing rate standards will almost always be higher than the cost of debt. See, *e.g.*, *Panhandle Eastern Pipe Line Co.*, 40 FPC 98, 108 (1968).

tion does not question the Court's requirement of a cash sale of El Paso's equity interest in the unlawfully acquired properties.

1. The cost to the New Company of incurring new debt at present interest rates (approximately 8.5 percent) would be at a rate more than 60 percent higher than would have been incurred under the district court's plan permitting assumption as part of the purchase price of a portion of El Paso's indebtedness at an average interest rate of 5.26 percent. Given the Northwest Division's present rates to consumers, the increased debt cost could result, under criteria normally applied by the Federal Power Commission in rate making proceedings, in a rate increase of approximately 9 percent.[3] Accordingly, the Commission, by a letter to the Solicitor General dated June 27, 1969, and reproduced as Appendix A, *infra*, has expressed "its deep concern" that, unless modified, the opinion "may seriously impair its ability to protect the ratepayers of the New Company * * *."

Nothing in the record indicates that the exchange by the New Company of its debt securities to El

[3] We assume a return on equity based on recent FPC rulings of 10 percent (see cases collected in *Area Rate Proceedings* (*Southern Louisiana Area*), 40 F.P.C. 530, 580); a capitalization for the New Company of 75 percent debt, 25 percent equity; an effective income tax rate passed to consumers of 50 percent; a rate base of $223,849,000 (El Paso Exh. 57); estimated 1968 revenues to be paid by Northwest Division rate payers at present rates, of $118,825,000 (El Paso Exh. 1, tab 10); present interest rates, based on recent issues of pipeline debt and the present bank prime rate, of 8½ percent; and an interest rate if the New Company assumes a pro rata share of El Paso's present indebtedness, plus a 1/8th percent additional roll-over cost, of 5.26 percent, as in the district court's plan.

CONTINUED

Paso's creditors for a pro rata share of El Paso's indebtedness will create any community of interest between the two companies that threatens an anticompetitive effect. On the contrary, such an exchange would facilitate the divestiture by offering the purchaser an opportunity to buy the properties at a substantially lower interest cost than presently obtains, thus giving the New Company a cost advantage in calculating rates for competitive service to California, and avoiding the threat of increased rates to consumers in the Northwest.

The plan approved by the district court preserved no financial relationship between El Paso and the

---

Our calculations further assume that the purchase price will equal or exceed the present rate base value of the property. A reduction below the rate base value sufficient to offset the purchaser's higher interest costs could result, instead, in a burden of higher rates to be borne by consumers served by El Paso. See pp. 7–8, *infra*.

On these assumptions the following calculations can be made:

1. Rate of return:	
If debt assumed:	
Debt (75% × 5.26%)	3. 945
Equity (25% × 10%)	2. 5
Over-all rate	6. 445%
If refinanced:	
Debt (75% × 8.5%)	6. 375
Equity (25% × 10%)	2. 5
Over-all rate	8. 875%
2. Rate of return applied to rate base:	
If debt assumed: ($223,849,000 × 6.445%) equals $14,427,068 doubled to cover income taxes	$28, 854, 136
If refinanced: ($223,849,000 × 8.875%) equals $19,866,598 doubled to cover taxes	$39, 733, 197
3. Difference between assumption and refinancing	$10, 879, 061
4. Effect of difference on revenues at present rates: approximately 9 percent of $118,825,000 estimated revenues produced by 1968 rates of NW Division	$10, 879, 061

New Company with respect to the indebtedness to be exchanged. It provided, as part of the purchase price, for the New Company to issue to each El Paso debt holder of New Company, securities in an amount proportional to the Northwest Division's pro rata share of the system-wide debt, at an interest rate equivalent to the rate on the El Paso securities to be assumed, plus an increase of 1/8th of one per cent representing the "roll-over cost" of the exchange. The El Paso creditors were to surrender the El Paso bonds and debentures to be exchanged to El Paso for cancellation. Once the divestiture was accomplished El Paso would have no obligation on the assumed debt, and the New Company would have no obligation to El Paso respecting it. A complete substitution of the New Company for El Paso as the debtor on the obligations exchanged was to be effected.[4] The creditors involved, representing 99.3 percent of El Paso long term debt holders, are 83 institutional investors including a large number of insurance companies, fraternal organizations, several banks, universities and investment funds, all of which, we are informed, are investors in a wide range of activities.[5]

2. Although it is common for institutional lenders to hold the debt of competing borrowers, the Court may be concerned with the possibility that El Paso-New Company debt holders might attempt to influence the activities of one company to the competitive bene-

[4] El Paso Exh. 1, p. 11, Tab 17; Implementing Documents, "Agreement," pp. 6, 11–12, 36.

[5] A complete list of the assenting creditors (El Paso Exh. 1, Tab 15) is set forth in Appendix B, *infra*.

fit or detriment of the other. In view of the number and dispersion of the creditors, this possibility seems remote, but may be an issue which the district court should explore on remand. If it finds, however, that there is no threat that the exchange of the debt will result in anticompetitive influence by the creditors, then we suggest that, in its discretion (and especially in light of any changes that may occur in prevailing interest rates), the district court should be permitted to authorize an assumption of a portion of El Paso's debt by the New Company, provided the terms of such an assumption create no financial relationship between the two firms.

Should the district court find, however, that exchange of the debt is undesirable (because of changed conditions, a threat of anticompetitive consequences or for other reasons), it should then attempt, insofar as feasible, to protect the New Company and its rate payers from the higher purchase costs that ordinarily would result if the debt were not assumed. Since the purpose of the divestiture is to restore competition in the California market to what it was prior to the unlawful merger, any additional burden which results from El Paso's retention of the unlawfully acquired assets during the period of litigation should be imposed on El Paso rather than the New Company. This should be accomplished, however, in a manner which does not simply transfer the burden from rate payers served by the New Company to El Paso rate payers, but which, to the maximum extent possible, imposes

the higher costs of divesting the Northwest Division on El Paso's owners.[6]

The foregoing paragraph should not, however, be taken as an indication that the district court will necessarily be able to obviate the problem of the purchaser's increased interest costs (in the absence of assumption of a share of the debt) by merely requiring a proportional reduction in the purchase price. In order to assure protection of New Company's rate payers under the criteria normally applied by the Federal Power Commission, such a reduction in the purchase price would have to be sufficient to reduce the cost of the acquired assets on the books of the New Company to a figure which is less than their depreciated original cost (the rate base value of the assets) by an amount equivalent to the effect of the change in the debt costs. This might well require a purchase price which would substantially impair El Paso's equity position, and which might then redound to the detriment of its rate payers. In an effort to protect the latter as well as New Company's rate payers, the district court conceivably might approve an only partially reduced purchase price, subject to a condition that the New Company be required by the Commission to reflect less

---

[6] We do not here attempt to describe the form which such protection against additional costs might take. Devising it would undoubtedly require the cooperative efforts of the court in entering the decree of divestiture and the Federal Power Commission in fixing the rates of the resultant companies. Although the Commission has substantial latitude in fashioning its certificate and rate orders, it would, of course, have to act in the context of the purchase price specified by the decree of divestiture. This means that the district court should consider the rate consequences in fashioning its decree, if it decides that assumption of the debt is impermissible.

than its full debt costs for rate making purposes. Such a restriction on New Company's earnings might, however, impede the purpose of the decree by discouraging potential purchasers of New Company as well as reducing the incentive and ability of the purchaser to compete for the California market.

We believe that leaving to the district court discretion to determine whether or not the New Company should be permitted to assume a portion of El Paso's indebtedness as part of the purchase price, and discretion to determine what special protections are necessary if exchange of the debt is impermissible, will enhance the likelihood that a purchaser can be found promptly, and that complete divestiture with a restoration of conditions conducive to competition will be achieved.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
RICHARD W. MCLAREN,
Assistant Attorney General.
LAWRENCE G. WALLACE,
Assistant to the Solicitor General.
HOWARD E. SHAPIRO,
Attorney.

JULY 1969.

CERTIFICATE OF COUNSEL

I hereby certify that this motion is presented in good faith and not for delay.

ERWIN N. GRISWOLD,
Solicitor General.

APPENDIX A

FEDERAL POWER COMMISSION,

Washington, June 27, 1969.

Re *Utah Public Service Commission* v. *El Paso Natural Gas Company,* October Term 1968, No. 776.

Hon. ERWIN N. GRISWOLD,
Solicitor General
Department of Justice,
Washington, D.C.

MY DEAR MR. SOLICITOR GENERAL:

The Federal Power Commission has asked me to advise you of its deep concern that the Supreme Court's June 16, 1969, opinion in this case may seriously impair its ability to protect the ratepayers of the New Company to whom the El Paso properties will eventually be divested, as well as possibly those of El Paso itself, unless the district court is authorized and directed specifically to take into account the probable rate consequences of its action when such questions reach the Commission.

If, as may well be the case, the Court's opinion is construed to mean that the district court is barred from approving any divestiture plan under which a purchaser of the assets to be divested might assume a portion of the relatively low cost debt obligations now owed by El Paso, it seems clear that the purchaser would have to raise a substantial portion of the purchase price by borrowing at the presently much higher interest rates. Moreover, the alternative of financing all or a substantially larger portion of the acquisition by equity capital would similarly have an adverse

effect upon rates in view of the loss of tax deductions on the interest on the debt and the normally higher cost of equity financing. Accordingly, if the price for the facilities finally ordered to be divested fails to reflect the impact on debt costs of a wholly cash sale, it will be difficult, if not impossible, for the Commission to fail to reflect such costs in its subsequent rate determination for the New Company. For although the Commission has substantial latitude in fashioning its certificate and rate orders, it will have to act in the context of the purchase price specified by the decree of divestiture..

The rates of both El Paso's customers and those of the New Company could also be significantly affected by the reserves reallocation seemingly contemplated by the Court's decision.

In view of the serious nature of these considerations, the Commission strongly urges that they be presented to the Court through an application for rehearing or clarification. In our view such an application should, at the very least, urge that the district court, in fashioning its decree of divestiture, be required to take into account the rate consequences of its actions.

Sincerely yours,

(S) Richard A. Solomon
RICHARD A. SOLOMON,
General Counsel.

APPENDIX B

El Paso Natural Gas Company

SECURITY HOLDERS INDICATING AGREEMENT IN PRINCIPLE WITH DEBT SECURITY PROVISIONS SIMILAR TO THOSE IN THIS PLAN OF DIVESTITURE

[Stated in thousands of dollars]

Name (a)	Bonds (b)	Debentures (c)	Total (d)
Aetna Insurance Company	$1,459		$1,459
Aetna Life Insurance Company	25,077	$14,059	39,136
American National Insurance Company	1,105		1,105
Annuity Fund for Congregational Ministers		74	74
Bankers Life Insurance Company of Nebraska	224	213	437
Board of Lay Trustees, University of Notre Dame Du Lac	57		57
The Bowery Savings Bank	1,670		1,670
State of California, State Employees' Retirement System	13,284		13,284
State of California, State Teachers' Retirement System	7,633		7,633
Central Life Assurance Company	283	215	498
The Chase Manhattan Bank	14,595	522	15,117
Commonwealth Life Insurance Company	315		315
Connecticut General Life Insurance Company	15,055	4,386	19,441
The Connecticut Mutual Life Insurance Company	7,271	2,194	9,465
Continental Assurance Company		919	919
Continental Illinois National Bank and Trust Company of Chicago	368		368
Country Life Insurance Company	170		170
East River Savings Bank	1,862	2,991	4,853
The Equitable Life Assurance Society of the United States	35,897	33,315	69,212
Equitable Life Insurance Company of Iowa	917	919	1,836
Farmers & Mechanics Savings Bank	54		54
The Fidelity Mutual Life Insurance Company	2,602	147	2,749
The First National Bank of Chicago	704		704
The First National Bank, Minneapolis, Minnesota	75		75
First National City Bank	1,611		1,611
The First Pennsylvania Banking and Trust Company		104	104
The Ford Foundation	1,800		1,800
The Franklin Life Insurance Company	1,330		1,330
Guarantee Mutual Life Company	113		113
The Guardian Life Insurance Company of America	1,490	2,073	3,563
Gulf Life Insurance Company	727		727
John Hancock Mutual Life Insurance Company	30,112	13,461	43,573
Home Life Insurance Company	2,517	406	2,923
Indianapolis Life Insurance Company	283		283
Industrial Indemnity Company	98		98
Investors Mutual, Inc	6,903	2,609	9,512
Investors Syndicate of America, Inc		3,542	3,542
Investors Selective Fund, Inc	135		135
Investors Syndicate Life Insurance and Annuity Company	270		270
Jefferson Standard Life Insurance Company	873	1,365	2,238
The Lincoln National Life Insurance Company	3,987	1,946	5,933
The Lutheran Brotherhood		675	675
Massachusetts Mutual Life Insurance Company	1,963	3,191	5,154
Mellon National Bank and Trust Company	2,327		2,327

SECURITY HOLDERS INDICATING AGREEMENT IN PRINCIPLE WITH DEBT SECURITY PROVISIONS SIMILAR TO THOSE IN THIS PLAN OF DIVESTITURE

[Stated in thousands of dollars]

Name (a)	Bonds (b)	Debentures (c)	Total (d)
Metropolitan Life Insurance Company	220,694	48,017	268,711
Modern Woodmen of America		854	854
Morgan Guaranty Trust Company of New York	2,946	619	3,565
The Mutual Benefit Life Insurance Company	6,670		6,670
The Mutual Life Insurance Company of New York	20,621	5,843	26,464
Mutual Trust Life Insurance Company	142		142
National Life Insurance Company	1,737	460	2,197
New England Mutual Life Insurance Company	8,610	3,192	11,802
New York Life Insurance Company		13,110	13,110
North American Reassurance Company	242		242
The Northwestern Mutual Life Insurance Company	10,969	3,458	14,427
Pacific Mutual Life Insurance Company	2,923		2,923
The Penn Mutual Life Insurance Company	1,053	3,324	4,377
The Philadelphia Saving Fund Society	3,109	243	3,352
Phoenix Mutual Life Insurance Company	2,552		2,552
Pilot Life Insurance Company		355	355
Princeton University	300		300
Provident Mutual Life Insurance Company of Philadelphia	5,193		5,193
Retirement Fund for Lay Workers of The Congregational Church		74	74
The Rockefeller Institute	700		700
Royal Neighbors of America	425		425
State Farm Life Insurance Company	142	181	323
Sun Life Assurance Company of Canada	16,727	1,727	18,454
Teachers Insurance and Annuity Association of America	1,888	580	2,468
Teachers' Retirement System of Georgia		1,320	1,320
The Travelers Insurance Company	31,342	6,581	37,923
The Trustees of Columbia University in the City of New York	229		229
Trustees of the General Electric Pension Trust	8,606		8,606
Union Dime Savings Bank	198		198
United Church Board for Homeland Ministries		37	37
United Church Board for Homeland Ministries—American Missionary Association		61	61
United Church Board for Homeland Ministries—Dillard		37	37
United Church Foundation, Inc		37	37
United States Steel and Carnegie Pension Trust	12,819	435	13,254
United States Trust Company of New York	449		449
The Volunteer State Life Insurance Company		73	73
Wenner-Gren Foundation for Anthropological Research, Incorporated	40		40
The Western & Southern Life Insurance Company	88		88
State of Wisconsin Investment Board	567		567
Total	549,197	179,944	[1] 729,141

[1] Represents 99.2% of the total of $734,259 of Debt Outstanding.

U.S. GOVERNMENT PRINTING OFFICE: 1969

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION,
Appellant,
vs.
EL PASO NATURAL GAS COMPANY, et al,
Appellees.

On Appeal from the United States District Court
for the District of Utah

Petition for Modification of The Public Utilities Commission of the State of California

---

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Dated: July 9, 1969

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION, *Appellant,* vs. EL PASO NATURAL GAS COMPANY, et al, *Appellees.*	

On Appeal from the United States District Court for the District of Utah

Petition for Modification of The Public Utilities Commission of the State of California

---

The Public Utilities Commission of the State of California (California PUC), intervenors in this matter before the United States District Court, hereby petitions this Honorable Court to modify its order vacating the judgment of the United States District Court and remanding the cause for further proceedings.

The California PUC is a regulatory body charged with the responsibility of protecting the interests of California

ratepayers. We participated actively in these proceedings before the United States District Court in order to assure that the decision by that District Court would not adversely affect the rates and service of California ratepayers. In our brief to the District Court we emphasized the fact that California gas utilities, and through them, California gas consumers will continue to be customers of El Paso Natural Gas Company (El Paso) after divestiture. Thus, we contended that the District Court must frame its decree in such manner as to place any adverse impact of its decree on El Paso's shareholders rather than its customers. (Brief dated April 15, 1968.) On the basis of the record before the District Court we were satisfied that the California consumers were protected.

This effort of the California PUC is compatible with the goals of the Supreme Court as stated in *Cascade Natural Gas Corporation, et al., v. El Paso Natural Gas Company*, 386 U.S. 129, 135 (1967):

> "In the present case protection of California interests in a competitive system was at the heart of our mandate directing divestiture. For it was the absorption of Pacific Northwest by El Paso that stifled that competition and disadvantaged the California interests. It was indeed their interests, as part of the public interest in a competitive system, that our mandate was designed to protect."

No protection of California's interests will have been obtained if El Paso emerges from the proceedings unable to meet existing gas service obligations to California.

The purpose of this filing is neither to urge the Court to rehear its Opinion of June 16, 1969, nor to further delay divestiture proceedings. Our purpose is to urge the Court to clarify its mandate as to the range of flexibility the Dis-

trict Court may exercise in fashioning a decree that will protect the interests of the California consumers as present and future customers of El Paso and as potential customers of New Company.

The California PUC wishes to make it abundantly clear that it does not take issue with the Court's determination that, "Retention by El Paso and its stockholders of the preferred stock is perpetuation to a degree of the illegal intercorporate community." (Opinion, p. 7.) Similarly, we are not concerned with this Court's requirement of a cash sale, since the effect of this requirement must fall on El Paso's shareholders, not its ratepayers. The California PUC also does not oppose the Court's reopening of the proceeding to permit other applicants for acquisition to compete for the right to purchase New Company, since this also should not, in and of itself, affect rates or service to California.

The California PUC is concerned about the effect of a new allocation of reserves between New Company and El Paso and the Court's statement that, "Assumption of $170,-000,000 of El Paso's indebtedness helps keep the two companies in league." (Opinion, p. 7.)

El Paso is now supplying California with gas from reserves which are essentially those it would have retained after divestiture under the vacated decree. The record below indicated that El Paso could have met its then existing gas service agreements with California utilities. Since the issuance of the decree below El Paso has received a certificate from the Federal Power Commission to increase its sales to California utilities by 250 million cubic feet per day. *El Paso Natural Gas Co.*, Opinion No. 549, ...FPC ....(Oct. 30, 1968). It has recently filed an application to the Federal Power Commission to sell an additional 200 million cubic feet per day through existing facilities to

the ever-growing California market. *El Paso Natural Gas Co.*, Docket No. CP69-348. There has been no record made as to El Paso's ability to meet its new gas service obligations if more reserves are to be allocated to New Company. It is imperative that the District Court not feel constrained to allocate gas reserves in a manner which may curtail the presently anticipated gas service to California for 1969 and 1970.

Due to the high interest cost currently facing borrowers of debt money, the transfer of $170,000,000, or some lesser amount, of El Paso's total indebtedness would be of material benefit to New Company in rendering service at the lowest possible rates. This Court is certainly aware of the fact that the major sources of debt money for natural gas pipelines are limited. In general, the lenders of debt money would be the same for New Company, whether new debt issues are financed at today's astronomic interest rates or New Company acquires a portion of El Paso's total indebtedness, which presently covers the facilities serving California and New Company, at an interest rate similar to that charged El Paso. Under either circumstance the indenture provisions must be separately negotiated. Should the new record indicate that the cheapest source of debt financing to New Company is a transfer of a portion of the outstanding obligations of El Paso, it would be unfortunate to handicap New Company with a cost of debt that might preclude economic competition for service to California or increase the cost of gas to California ratepayers prior to certification and construction of a new pipeline to California. Neither the California interests nor New Company would benefit by this result. The District Court must not feel compelled to require new debt issuance if no anti-competitive effect is proven by a cheaper method of financing.

This Court's Opinion of June 16, 1969, has made it abundantly clear that, ". . . the pinch on private interests is not relevant to fashioning an anti-trust decree, as the public interest is our sole concern." (Opinion, p. 7.) The objective of the California PUC is to make certain that the hurt from this pinch stays with El Paso, and is not passed along to the innocent California customers. Modification of this Court's Opinion of June 16, 1969 in the manner requested by the California PUC will further insure that the District Court and all other governmental bodies who may eventually cope with some aspect of these proceedings will pursue these same goals.

WHEREFORE, California PUC petitions the Court to modify its mandate herein to indicate to the District Court that the determination of the proper allocation of gas reserves and methods of debt financing must be made in such manner as will not disadvantage the California interests whom the Court desired to protect.

Respectfully submitted,

/s/ MARY MORAN PAJALICH
Mary Moran Pajalich
Chief Counsel

/s/ SHELDON ROSENTHAL
Sheldon Rosenthal
Principal Counsel
5072 State Building
San Francisco, California 94102

Attorneys for the Public Utilities Commission of the State of California

Dated: July 9, 1969

I hereby certify that the foregoing Petition for Modification is made in good faith and not for delay and is restricted to the grounds above specified.

/s/ SHELDON ROSENTHAL
Sheldon Rosenthal

PETITION FOR REHEARING

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION,

Appellant,

vs.

EL PASO NATURAL GAS COMPANY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

PETITION FOR REHEARING

VERNON B. ROMNEY

Attorney General, State of Utah

Attorney for Appellant, Utah Public Service Commission

236 State Capitol
Salt Lake City, Utah

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION,

Appellant,

vs.

EL PASO NATURAL GAS COMPANY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

PETITION FOR REHEARING

Comes now Utah Public Service Commission, appellant herein, and petitions the Court for a rehearing in the above entitled cause, and in support thereof respectfully shows:

GROUNDS FOR REHEARING

I

The refusal of the Court to dismiss the appeal of appellant, Utah Public Service Commission, on its own motion, is not in accordance with the Rules of the Supreme Court and, in particular, with Rule 60.

II

The decision upon which rehearing is sought by appellant was made without a substantial hearing being had on the merits,

with the result that important matters were not brought to the attention of the Court.

III

The decision will impose a further substantial delay in the ultimate determination of the case with the resultant possibility of injury to many interests involved, including those of the State of Utah.

IV

The requirement that a "cash sale" be made to fulfill the requirement of complete divestiture is not in accordance with the public interest inasmuch as present interest rates are such as to place upon the new company a tremendous and possibly even prohibitive financial burden, the effect of which will be to substantially raise rates for customers of the system, including those in Utah.

V

The likely increase in gas prices may negatively affect the ability of gas to compete with other fuels.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Petition for Rehearing be granted and that upon further consideration the appeal of the State of Utah be dismissed as heretofore prayed.

Respectfully submitted

UTAH PUBLIC SERVICE COMMISSION

By ______________________

VERNON B. ROMNEY
Attorney General, State of Utah
Attorney for Appellant, Utah Public Service Commission

CERTIFICATE OF COUNSEL

I, Vernon B. Romney, counsel for the above named appellant, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

VERNON B. ROMNEY
Attorney General, State of Utah

Attorney for Appellant, Utah
Public Service Commission

July, 1969

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION,

Appellant,

vs.

EL PASO NATURAL GAS COMPANY, ET AL.,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

AFFIDAVIT OF PROOF OF SERVICE OF PETITION FOR REHEARING OF UTAH PUBLIC SERVICE COMMISSION

I, VERNON B. ROMNEY, being duly sworn, depose and say:

1. I am the Attorney General of the State of Utah and I am the attorney for the Utah Public Service Commission, appellant in the above entitled cause.

2. Each of the parties to the above entitled cause, whose names are set out below, has pursuant to Rule 33 of the Rules of the Supreme Court of the United States, been served with the foregoing Petition for Rehearing of the Utah Public Service Commission by placing a copy of the Petition for Rehearing of Utah Public Service Commission in an envelope addressed to each of the attorneys listed below for the parties listed below at his address listed below and by depositing each such envelope in the United States' mail with air mail postage prepaid or in case of local parties, regular mail postage prepaid, and by placing a copy of the foregoing Petition for Rehearing of Utah Public Service Commission in an envelope ad-

dressed to the Solicitor General, Department of Justice, Washington, D.C. and by depositing said envelope in the United States' mail with air mail postage prepaid.

3. In addition, a copy of the foregoing Petition for Rehearing of Utah Public Service Commission has been placed in an envelope addressed to Richard A. Solomon, General Counsel, Federal Power Commission, Washington, D.C. 20426 and deposited in the United States' mail with air mail postage prepaid.

4. In addition, a copy of the foregoing Petition for Rehearing of Utah Public Service Commission has been placed in an envelope addressed to the Honorable Hatfield Chilson, United States Courthouse, Denver, Colorado, and deposited in the United States' mail with air mail postage prepaid.

5, In addition, a copy of the foregoing Petition for Rehearing of Utah Public Service Commission has been placed in an envelope addressed:

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prepaid, or in the case of local parties, regular mail postage prepaid.

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Dated this ______ day of July, 1969.

VERNON B. ROMNEY
Attorney General, State of Utah
Attorney for the Utah Public
Service Commission, Appellant

Subscribed and sworn to before me this ______ day of July, 1969.

Notary Public
Residing at Salt Lake City, Utah

My Commission Expires:

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION, *Appellant*, vs. EL PASO NATURAL GAS COMPANY, et al, *Appellees.*	

On Appeal from the United States District Court for the District of Utah

Petition for Rehearing

To the United States Supreme Court and the Justices Thereof.

San Diego Gas & Electric Company, Appellee, presents this, its petition, for a rehearing of the above-entitled cause, and, in support thereof, respectfully shows:

I

On June 16, 1969, the Court issued a decision on the merits in the above-entitled matter without notice to the

parties. The Court was thus deprived of adequate briefing and argument regarding issues, particularly concerning division of gas reserves, the resolution of which will have a lasting, and, if the decision stands, detrimental effect on millions of gas and electric consumers in the State of California.

II

The Court has said with regard to this prolonged case, "In the present case protection of California interests in a competitive system was at the heart of our mandate directing divestiture". *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) 135. Yet, the June 16, 1969 decision is injuriously inconsistent with the Court's goal of "protection of California interests". This failure of the Court to meet its own standards results from a misunderstanding of the "California interests" apparently due to lack of notice and inadequate briefing of the issues of the case.

III

In *Cascade*, the Court said with regard to division of gas reserves:

1. "The gas reserves granted the New Company must be no less in relation to existing reserves than Pacific Northwest had when it was independent", and
2. "the new gas reserves developed since the merger must be equitably divided between El Paso and the New Company" 386 U.S. at 136-7.

The June 16, 1969 decision does not appear to question compliance by Judge Chilson with the first standard. The Court's criticism is directed at the division of the new gas reserves. The Court finds that even though Judge Chilson "gave the New Company more than 50% of the net

additions to the reserves developed since the merger" this was not enough—this was not "equitable". But the newly discovered gas which the Court decrees must be given to New Company are reserves for which the California consumer has already paid substantial sums.

IV

El Paso Natural Gas Company ("El Paso"), through rates, legally authorized by the Federal Power Commission, recoups its cost of service including its expenses of exploration, acquisition, and development of natural gas in the San Juan Basin and elsewhere. These charges by El Paso are passed on as costs to the California consuming public. Californians are by far the major purchasers of El Paso gas. Thus, the California consumers have paid for the exploration, acquisition and development of much of the gas reserves which the Court now seeks to divert to New Company. Most of these same reserves were, absent the June 16, 1969 decision, committed to serve the California consumer.

V

It is small comfort to California consumers that the additional new gas reserves which the Court now says New Company must have, are for the purpose of mounting a competitive challenge in California. There is no assurance this gas will ever come to California. If it comes, it will be too late to supply the State's current requirements. While we would welcome the additional competition of New Company, we strongly oppose sacrificing our ability to meet the requirements of our customers for the sole purpose

of providing a fourth competitor in the California gas pipeline market. In other words, we believe Judge Chilson has been more than generous with New Company already, in giving it gas reserves that were developed with California consumer dollars.

VI

In the practical resolution of the question of whether another pipeline can compete in California the stake is high. That stake, to the extent of gas reserves, has been paid for in large part by the California consumer. The value of these reserves has recently increased because of growing scarcity of new supplies of natural gas of interstate pipeline amounts. Recently, Transwestern Pipeline Company informed southern California gas distributors that they would be unable to supply an expected much needed increment of gas. Further, El Paso indicated it would be unable to provide substitute supplies. Now, the Court says that the gas reserves California customers are depending upon shall be further reduced by diverting them to New Company. The California consumer did not promulgate the condemned merger. We cannot understand why we should be punished for it by further depletion of needed gas reserves.

VII

The probability of California customers receiving the diverted gas reserves lessens with every passing day. To successfully compete in California, New Company, no matter how strong it may be, will face substantial economic and gas supply problems. There are three healthy competitors already in the field. These competitors can increase pipeline capacity on an incremental basis. New Company

must build a new pipeline under inflated cost conditions. Financing costs are at an all time high. Although the Lower Court adopted a financing arrangement which was highly beneficial to New Company, the Court did not recognize this. The California customer has a vital interest in seeing that if a competitor enters the field immediately, it be strong and healthy. We believe Judge Chilson devised a plan which had the best chance of accomplishing this additional competition and at the same time protecting California interests respecting gas supplies, should the competitive threat fail to materialize.

CONCLUSION

The Court said in *Cascade* that protection of California interests was at the heart of its divestiture mandate. Unhappily, however, the interests of the California consuming public have been misunderstood or ignored in the Court's June 16, 1969 decision. That decision will result in depriving California of an assured gas supply to meet the rapidly increasing demands of the consumers of this State, in the illusory hope that some future successful New Company might sometime (the case has already gone on for more than 10 years and been before this court 4 times) be a fourth competitor in the California gas market. All this has been done without notice, without opportunity for briefing and hearing. In all deference, we urge that Judge Chilson, the California interests, the Pacific Northwest interests, and all those who have labored diligently to carry out the mandate of the Court deserve either the Court's

complete attention, including complete briefing, or no attention at all (dismissal). We do not deserve a "lick and a promise".

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition For Rehearing is presented in good faith and not for purposes of delay.

C. HAYDEN AMES

In the Supreme Court of the United States

October Term, 1968

No. 776

Utah Public Service Commission,
Appellant,
vs.
El Paso Natural Gas Company, et al,
Appellees.

On Appeal from the United States District Court
for the District of Utah

Petition for Rehearing or in the Alternative *Sua Sponte* Modification of Opinion

---

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION,
Appellant,

vs.

EL PASO NATURAL GAS COMPANY, et al,
Appellees.

On Appeal from the United States District Court
for the District of Utah

Petition for Rehearing or in the Alternative *Sua Sponte* Modification of Opinion

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Pacific Gas and Electric Company, Intervenor in *United States v. El Paso Natural Gas Co., et al.*, designated Civil Action Number C-143-57 in the United States District Court for the District of Utah, petitions for rehearing or in the alternative *sua sponte* modification of the Opinion herein issued June 16, 1969.

Said Opinion injures Petitioner and other existing California gas customers of Appellee El Paso Natural Gas Company (El Paso) and the consumers they serve.

Petitioner has substantial and vital interests affected by these proceedings. It is a regulated public utility serving

the gas and electric needs of most of northern and central California. It is a purchaser of large volumes of gas for distribution to its customers and to fuel its steam electric generating plants.

Petitioner presently purchases approximately 1.1 billion cubic feet of natural gas per day from El Paso Natural Gas Company at the California-Arizona border under long-term contracts. Petitioner transmits this gas through its own extensive transmission system to its distribution area. The sale of this daily volume of gas to Petitioner by El Paso was authorized by the Federal Power Commission under the Natural Gas Act upon an evidentiary demonstration that El Paso had adequate reserves of natural gas under its control by ownership or contracts with gas producers to support delivery of such daily volume for a period of time sufficient to justify the cost to El Paso and to Petitioner of the facilities required to transmit such volume from the producing area to the distribution area served by Petitioner.

Petitioner depends upon the daily volume of gas it purchases from El Paso to meet its demand for gas in its distribution area by its gas customers and its electric customers whose electric service is dependent in large part upon the availability of natural gas to fuel electric generating plants.

Petitioner participated in the proceeding before the District Court as an intervenor permitted to intervene under *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) to protect its interest in the continuation of its supply of gas from El Paso and its interest in preventing, if possible, any increases, resulting from the divestiture, in the cost to El Paso of continuing to serve Petitioner if such costs would be of the type which could be passed on to Petitioner in a rate increase proceeding before the Federal Power Commission.

GROUNDS FOR REHEARING OR IN THE ALTERNATIVE SUA SPONTE MODIFICATION OF THE OPINION

The divestiture decree of Judge Chilson did not adversely affect any of the interests Petitioner was seeking to protect. Petitioner therefore did not seek to appeal the decree. Nor did Petitioner have reason to view with concern the Notice of Appeal and the Jurisdictional Statement filed herein by the Utah Public Service Commission (Utah). The appeal of Utah questioned the qualifications of Colorado Interstate Gas Company to own and operate the properties to be divested and not the adequacy of the reserves to be divested.

Petitioner, relying upon the Rules of this Court and its time-honored practices, knew that if the appeal of Utah was not dismissed by the Court the issues raised by that appeal would be the subject of briefs and oral argument before this Court and that Petitioner would have a right to participate to protect its interests. It further knew that issues not raised by the appeal of Utah would not be before the Court and would not be heard.

Petitioner also knew the subject of the hearing on April 29, 1969 was on the narrow issue of whether the appeal of Utah could be withdrawn, that if it were not permitted to be withdrawn the normal briefing schedule and oral argument would thereafter follow, and that the issues to be briefed would be those raised by Utah, or any other issues legitimately raised by others, and that each party and intervenor in the proceeding below would have an opportunity to brief and argue all issues raised.

However, issues raised by no participant, argued by none, not before this Court under established rules of practice and not in fact heard by this Court, one of which seriously affects Petitioner's interests, were decided in a summary manner.

At pages 4-5 of the Opinion this Court said:

> "Concededly the total reserves of the New Company will not be sufficient to meet the old Northwest's existing requirements and those of a California project. * * *
>
> "The purpose of our mandate was to restore competition in the California market. An allocation of gas reserves should be made which is 'equitable' with that purpose in mind. The position of the New Company must be strengthened and the leverage of El Paso not increased. That is to say, an allocation of gas reserves —particularly those in the San Juan Basin—must be made to rectify, if possible, the manner in which El Paso has used the illegal merger to strengthen its position in the California market. The object of the allocation of gas reserves must be to place New Company in the same relative competitive position *vis-a-vis* El Paso in the California market, as that which Pacific Northwest enjoyed immediately prior to the illegal merger.
>
> "A reallocation of gas reserves under this standard may permit an applicant other than Colorado Interstate Corporation to acquire New Company and make it a competitive force in California. Thus, the District Court is directed to effect this reallocation of gas reserves, and in light of the reallocation, to reopen consideration of which applicant should acquire New Company." .... U.S. at ....

This language seems to direct the District Court to allocate reserves to the New Company from the San Juan Basin sufficient to support a new pipeline project to California.

This direction was made without the benefit of written and oral argument developing the damage to the gas-consuming public of California of such an allocation. The direction was made without notice to that consuming public, and distributors who serve them, of this danger to their gas

supply and hence without an opportunity afforded them to protect their substantial interests. As a result, Petitioner was deprived of its day in court to protect the interests of its customers.

The language of the direction need not go as far as it did to accomplish the overall purpose of the Opinion. The language could be restricted, and we submit should now be restricted by a *sua sponte* modification of the Opinion to eliminate the danger to the reliability of Petitioner's gas supply. After all, El Paso's California customers are innocent of any wrong and are the very victims of the Clayton Act violation the Court seeks to benefit by the divestiture.

The allocation of reserves under the decree below is as follows based on reserves as of January 1, 1967. .... F.Supp. at ....

	New Company	EPNG
San Juan, bcf	3,207	11,509
%	21.8	78.2
Total System Reserves, bcf	9,256	30,165
%	23.5	76.5
1966 Requirement, bcf	343	1,268
Reserve Life Index, Years	27.0	23.8
Deliverability Life, Years	12	10

The District Court found that El Paso could not transfer additional reserves to New Company sufficient to support a new California project without jeopardizing El Paso's ability to continue serving its southern division customers, including Petitioner. Judge Chilson found:

> "If the division of the reserves is to be measured by the requirements of New Company to serve the Northwest division and to supply a project by which New Company would compete in the California market, the Court finds, and it is admitted by most of the parties in interest if not all of them, that the present total system reserves by any estimate in evidence are not

> sufficient to meet those requirements of New Company and the requirements of the southern division. To divest to New Company reserves to meet the above requirements would necessarily require the invasion of reserves which are dedicated to the service of the southern division." .... F.Supp. ....

Although the record contains several estimates of the reserves required to support a new pipeline project to California, no specific estimate or range of estimates was referred to by Judge Chilson in his above finding. However, one estimate may be considered as an illustration of the magnitude of the reserves that might be divested from El Paso under the Court's direction and thereby show the potential damage to the California gas consumers of the Court's direction.

Pacific Western Pipeline Corporation, one of the applicants for acquisition, introduced into evidence a detailed study by Bechtel Corporation of two alternative projects to deliver gas to the California-Arizona border.[1] (Pacific Western Ex. 11, R. ....) One would transport gas from the San Juan Basin and the other from the Delaware Basin of West Texas. The San Juan project was the more modest of the two and would require less reserves. It would deliver 400 million cubic feet of natural gas per day to the California border near Topock, Arizona. The study concluded that gas reserves in the magnitude of 4.5 trillion cubic feet would normally be required to support such a project.

Thus on the basis of the record in this case, approximately 4.5 trillion cubic feet of additional gas reserves might be divested from El Paso and allocated to New Com-

---

1. Other applicants for acquisition mentioned possible projects for delivering gas to California. However, this was the most comprehensive and detailed plan submitted.

pany under the Court's direction to give New Company additional reserves to support a new project to California.

The full magnitude of the harm of El Paso's customers of such a loss of reserves is not shown in the record, because that question was not before the District Court.

However, it is quite certain that El Paso's ability to continue its existing deliveries to Petitioner would be greatly impaired in the near future. Furthermore, the cost of maintaining that deliverability might be far greater to El Paso and that greater cost might be passed on to Petitioner.

The immediate damage to the reliability of the gas supply upon which Petitioner is dependent is not alleviated by the possibility that at some future date the divested reserves might be used to support a new project to California. Petitioner would have no assurance of the date on which new deliveries would commence, the volumes of gas it would receive, its cost, or that it would receive any gas at all from such a new project.

Issues which may have a far-reaching effect on the welfare of California consumers and on the ability of Petitioner to serve the needs of its customers must be decided on the basis of evidence, yet on remand the District Court seems tied by the mandatory nature of the language of the Opinion. Most certainly the Court did not truly mean that the District Court should transfer sufficient reserves for a new project to California if such transfer would do great harm to California.

CONCLUSION

For the reasons set forth above, Petitioner respectfully asks for a rehearing on the issue of the transfer of additional reserves to New Company (although in fact no hear-

ing has yet been held on this issue), if a rehearing is necessary to change the wording of the opinion. Petitioner requests, in the alternative, that the Court *sua sponte* change the language of the Opinion to eliminate its harm to California. The Court has not only the inherent power to police its own mandates, but it has the *a fortiori* power to correct and make clear its own Opinion to avoid unanticipated damage to the very segment of the public it purports to benefit by its decision.

Respectfully submitted,

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I hereby certify that the foregoing Petition for Rehearing or in the Alternative *Sua Sponte* Modification of Opinion is presented in good faith and not for delay.

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No. 776

IN THE

Supreme Court of the United States

October Term, 1968

UTAH PUBLIC SERVICE COMMISSION,
Appellant,

vs.

EL PASO NATURAL GAS COMPANY, et al.,
Appellees.

On Appeal from the United States District Court for the District of Utah

---

PETITION FOR REHEARING

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Utah Public Service Commission,

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vs.

El Paso Natural Gas Company, et al.,

Appellees.

On Appeal from the United States District Court for the District of Utah

---

PETITION FOR REHEARING

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, Intervenors in the case below and Appellees herein, pray that this Court grant rehearing of its decision of June 16, 1969, vacating the judgment of the United States District Court for the District of Utah and remanding the cause for further proceedings.

REASONS FOR GRANTING REHEARING AS TO THAT PART OF THE COURT'S DECISION AFFECTING SAN JUAN BASIN GAS RESERVES

1. A Serious Gas Supply Shortage for 11-Million Southern California Gas Consumers will be the Immediate Direct Result of this Court's Decision of June 16, 1969, Unless the Court Grants Rehearing.

Southern California Gas Company and Southern Counties Gas Company of California are gas public utilities charged by law with the obligation of meeting the gas needs of 11-million consumers. We will be unable to fulfill that obligation if the present Court decision stands. In its attempt to create a new competitive pipeline to the California market, the Court has unwittingly issued a disastrous decision. This decision will result in a loss to the California market of an invaluable portion of the San Juan Basin gas reserves presently dedicated to serve it, during the period of critical importance to the California consumers, which is while this Court's ultimate objective is sought to be achieved by the affected parties.

It is imperative that this Court be fully informed concerning the present gas supply posture insofar as meeting the needs of the southern California gas market is concerned. Eighty percent of our gas supply comes from out of state, and we are purchasing all available local production. Growth in our market area requires that we obtain additional out-of-state volumes of approximately 160 million cubic feet per day during each and every year to maintain our present service. Transwestern Pipeline Company is unable to contract to sell us additional gas supplies because it has insufficient gas reserves to

dedicate more to the California market. Our only hope to meet our near-term needs, pending ultimately a new gas supply project such as one we contemplated with New Company, is through El Paso Natural Gas Company.

The contract with Colorado Interstate Corporation entered into by interested California parties, including our Companies, provided for an earliest possible delivery date of November, 1973. That was a realistic date as to the time required to get a new gas supply project for New Company to meet California's needs. That date must now be pushed back in the future with the still further delay created by this Court's decision of June 16, 1969.

In order to meet part of our interim needs pending any possibility of a new gas supply project for New Company, we have entered into a contract with El Paso Natural Gas Company to supply us an additional 200 million cubic feet of gas per day. We had asked El Paso to provide us with an additional 350 million cubic feet of gas per day, but El Paso was unable to contract for more than 200 million cubic feet per day because of its then contemplated limited post-divestiture gas reserves. We had hoped to contract for still additional supplies from Transwestern Pipeline Company. That hope has now vanished, in view of Transwestern's own supply situation. As to the 200 million cubic feet per day which El Paso did contract to sell to us, we have encountered substantial difficulty because of this Court's order. El Paso initially refused to file an application with the Federal Power Commission for a certificate of public convenience and necessity for said 200 million cubic feet per day because of the possible impact upon its gas reserves position of this

Court's decision of June 16, 1969. Our Companies, pursuant to their public utility duty to meet the gas needs of their customers, demanded of El Paso that it comply with its contract commitment. El Paso has now filed with the Federal Power Commission its application, and judicial notice is hereby requested of said filing of June 24, 1969, at FPC Docket No. CP69-348. Over and above the 200 million cubic feet per day increment from El Paso we will need at least 525 million cubic feet per day before November 1, 1973, and additional volumes at that time.

Our public utilities cannot meet the needs of our gas consumers if the decision of this Court results in a stripping of El Paso reserves dedicated to and absolutely required to support our California market, or if it raises such a cloud over the title to those gas reserves that the Federal Power Commission will find it impossible to certificate future gas supplies to California by El Paso pending resolution of the implications of this Court's decree.

It is the obligation of this Court to the California gas consumers, which we believe the Court intended to protect, to make abundantly clear that it is not the intent of the Court that any action be taken by the District Court that will impair the ability of El Paso to meet its existing commitments to its customers, or which would impair the meeting of the market needs of the California consumers pending any new gas supply project to California by New Company.

2. The Role of New Company in Supplying Competition to California.

The thrust of the original decision in this proceeding, *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), was to restore competition for the new increments of supply to the California market. The District Court decree awarded significant additional reserves to New Company to those proposed in a prior decree, and on balance made a reasonable division of the reserves. The effect of this Court's most recent decision is to divide our presently dedicated supplies between El Paso and the emerging New Company in the apparent hope of instantly restoring competition to our present markets. The division of our presently dedicated supplies will not in any way restore competition for the new increments of demand. Such competition can only be restored by the discovery of new reserves, for if none are found there will be no gas supplies to meet our new increments of demand, regardless of whether the pipeline company involved is El Paso or New Company or some other pipeline.

The evidence in this proceeding is that there are two major potential sources of additional gas supply for the provision of competition to the California market. Our Companies presented evidence of potential gas supply available to New Company in the Rocky Mountain area of in excess of 40 trillion cubic feet (Tr. 9,439). One of the applicants presented independent evidence that it was 40 to 43 trillion cubic feet (Tr. 7,134). None of this evidence was disputed. In addition, El Paso presented evidence (Exhibit No. 46) that 400 million cubic feet per day was available from Canada. The long-term

prospects (4 to 5 years) for New Company to supply competition to California are excellent. The facts are that the United States presently is confronted with a gas supply shortage. Public notice of this fact is being taken daily. We will need every foot of gas that we can reasonably buy. It is from such new sources in addition to those reserves presently dedicated to serving California, such as San Juan Basin reserves, that gas supplies to California must come. We cannot by "fiat" create a new gas supply in the San Juan Basin which simply does not exist. Further division of the *existing* reserves can cause only harm to the California consumers. The undisputed evidence in this proceeding is that there are simply not sufficient reserves presently available to meet existing commitments to present customers of El Paso and to support a new gas supply project to California by New Company. If sufficient gas supplies are to be given to New Company out of existing developed reserves so that it may in future years mount a gas supply project to California, this can only be done by causing disastrous consequences to the California gas consumers in the interim. This is an intolerable result to this Court's efforts and desires to assist the California consumers.

3. This Court Must Demand of Itself the Same Due Process of Law that it Requires of Other Tribunals.

It is not at all surprising that the Court has unwittingly rendered such a disastrous decision, since the decision was rendered in a void. Prior to the entry of its decision which affected so vitally the issue of gas reserves, this Court neither invited any of the parties to argue the issue of the disposition of gas reserves nor, at the oral

argument on the motion of the appellant to dismiss the appeal under Rule 60, did the Court intimate that it was considering this issue or tender any questions concerning the issue to those parties who did argue on the motion to dismiss.

The Court set all oral argument on a very specific limited issue concerning whether or not "the motion of appellant to dismiss the appeal under Rule 60 and the motion of William M. Bennett for a hearing" should be granted. There was absolutely no indication by this Court that it was considering the merits of the proceeding. The Motion to Affirm filed by our Companies on December 19, 1968, was not set for briefing or oral argument. Because of the very specific disposition of the Court in setting oral argument as to what it was considering, our Companies did not participate in the oral argument since it was not directed to the merits of the proceeding but to ancillary questions. The California gas consumers have not had their day in court. Every vestige of due process

requires that this Court grant a rehearing on the issue of the division of gas reserves.

Respectfully submitted,

SOUTHERN CALIFORNIA
GAS COMPANY

SOUTHERN COUNTIES GAS
COMPANY OF
CALIFORNIA

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I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION,
Appellant

v.

EL PASO NATURAL GAS COMPANY,
Et Al.

On Appeal From The United States District Court For The District Of Utah

PETITION OF THE PEOPLE OF THE STATE OF CALIFORNIA FOR REHEARING OR MODIFICATION OF DECISION

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printed in CALIFORNIA OFFICE OF STATE PRINTING

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On Appeal From The United States District Court For The District Of Utah

PETITION OF THE PEOPLE OF THE STATE OF CALIFORNIA FOR REHEARING OR MODIFICATION OF DECISION

The People of the State of California, (California), intervener below and appellee herein, petition the Court that it grant a rehearing on or modify the Court's decision of June 16, 1969 which vacated the judgment of the District Court of Utah and remanded this matter for further proceedings.

I. GROUNDS FOR PETITION

The Court's June 16 opinion is a decision on the merits of this action; however, the opinion was based upon, and rendered after, summary and limited review of one facet only of the case.

On April 21, 1969 the Court ordered oral argument eight days later on two limited questions, first, should the motion of the last remaining appellant, the State of Utah, to dismiss its appeal herein be granted, or second, should the Court hear and review the case. The June 16 decision did not decide these questions; it did not order dismissal of Utah's appeal, or hearing and review of the case. Instead, and without opportunity for briefing or argument by the parties on the merits, the Court's decision of June 16 dealt with and disposed of the action on its merits.

As a result of such partial and summary consideration, the decision contains a provision as to reallocation of gas reserves which may well cause substantial adverse effects to California, the protection of whose interests were at the heart of the Court's mandate. (June 16 decision page 3).

Since the subject of reallocation of gas reserves was not argued, orally or by briefs, nor noticed for or heard by the Court, California asks that a rehearing or modification of the Court's decision in respect to such provision be granted.

II. REALLOCATION OF ADDITIONAL GAS RESERVES BY EL PASO NATURAL GAS COMPANY AS ORDERED WOULD PENALIZE CALIFORNIA

The Court's June 16 decision holds that the District Court's judgment does not satisfy the prior mandate of this Court; to in part accomplish compliance therewith, the decision directs that the District Court make a further allocation or reallocation of the gas reserves of El Paso Natural Gas Company (El Paso), to the end the divestee may be better equipped to be able to compete for gas sales in California.

The State of California is supplied with natural gas by three interstate pipeline systems, one of which is that of defendant and appellee El Paso. Such systems are packages consisting of three basic and integrated elements: (1) gas reserves; (2) pipeline or transportation facilities; and (3) contracts for sale of gas. To be economic packages, these elements must be proportioned to each other. To this end and as a general practice, pipeline owners acquire no more reserves than are necessary and build transportation facilities of no greater capacity than are required for their planned projects. They do not acquire, or undertake the financial burden incident to ownership of, excess or extra gas reserves beyond their needs.

California understands these principles were employed by defendant and appellee, El Paso, in the planning and development of its system which serves

California. It understands that El Paso has contracts to sell all the gas which its existing system can carry. It understands that El Paso has acquired only those quantities of gas reserves which were necessary for it to obtain Federal Power Commission certification and authority, not more. It understands that had the divestiture ordered by the District Court been consummated and the gas reserves divested been those ordered by the District Court, then El Paso would have retained only such quantity of gas reserves as were required to support and serve the system and customers which El Paso was to retain; El Paso would not have been left with nor would it have possessed reserves in excess of those needed to support its service.

The sole source of any further or additional gas reserves which the June 16 decision directs be reallocated will be from these reserves of El Paso which are already committed to California. Immediately upon divestiture by El Paso of any further reserves, California's gas-supply will be disrupted and, in the absence of interim arrangements, it will be deprived temporarily of gas reserves essential to meet its requirements.

More importantly, if, pursuant to the Court's decision, there is a reallocation and additional gas is divested, California may be subjected to a further and major loss. Such would occur were the divestee to attempt but fail in its endeavor to mount a new

California pipeline. Such failure could result from any number of causes including, for example, refusal of the Federal Power Commission to certificate and authorize such a project or inability on the part of the divestee to obtain financing therefor. In such event, the divestee could not simply continue to idly hold the reserves which had been divested to it to enable it to build a new pipeline to California; it would have no reason and could not be expected to pay the cost of holding idle reserves. To the contrary, the divestee would have incentive to make use of such reserves. The reserves which would be divested by El Paso are relatively inexpensive reserves and the existing pipeline system which is to be divested can use further reserves. In such situation the divestee could be expected to attempt to divert the additional gas divested from California to other markets. California would thereby entirely lose gas it now has and is relying upon, contrary to the manifest desire of this Court.

In light of this practical and realistic situation, and the fact that this matter was not decided after and on the basis of a hearing on the merits, California believes that a hearing on the merits should be granted to the end such adverse effects on California may be avoided or that the Court should modify its decision so as to make it specifically clear that the District Court is not to order any reallocation of further gas reserves so as to prejudice and deprive California of its present sources of gas.

III. CONCLUSION

In light of the foregoing, California respectfully asks that the Court either grant rehearing of its June 16 decision or that it modify and amend that decision so as to avoid the unhappy and significant adverse effects described above.

DATED: July 7, 1969.

Respectfully submitted,

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I hereby certify that the foregoing petition is presented in good faith and not for delay.

IVER E. SKJEIE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION,
Appellant,

v.

EL PASO NATURAL GAS COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

PETITION OF COLORADO INTERSTATE CORPORATION FOR RECONSIDERATION AND MOTION FOR HEARING ON THE MERITS

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July 11, 1969

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IN THE

Supreme Court of the United States

October Term, 1968

No. 776

Utah Public Service Commission,

Appellant,

v.

El Paso Natural Gas Company, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Utah

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PETITION OF COLORADO INTERSTATE CORPORATION FOR RECONSIDERATION AND MOTION FOR HEARING ON THE MERITS

Colorado Interstate Corporation ("CIG") prays that the Supreme Court recall its opinion and order of June 16, 1969 vacating the divestiture decree of the District Court, and that it afford the 33 parties which unanimously supported that judgment a hearing on the merits.

The welfare of millions of gas consumers is affected by this case. The regulatory agencies of ten States participated in the proceedings below. Yet this Court's summary reversal has followed, not a hearing on the merits, but solely a hearing confined by its own order to a procedural question. (22 L. Ed. 2d 751)

The Court has acted on the basis of a fatally defective record—one which omits 155 pages of "Implementing Documents" containing the very provisions which accomplish the divestiture this Court previously ordered* and now finds incomplete. In the absence of a hearing, and with a record barren of these critical elements, the Court has misunderstood the nature and purpose of the District Court's decree—a misunderstanding apparent from the majority opinion and demonstrable from the missing portions of the record.

The decision of the majority is, as a result, erroneous in two basic respects:

First, the decision below will immediately sever the divested properties from any influence or control by defendant El Paso Natural Gas Company ("El Paso"). It will prevent El Paso from ever again acquiring a voting interest in New Company or in CIG, or any influence or control over either. The form of the consideration to be paid El Paso is no more than a financing convenience; within a period of time shorter than that approved by the Court in other divestiture cases, El Paso will cease to have any interest at all in the New Company. The decision *did* accomplish a "complete divestiture" of the Northwest pipeline system, and it *did* establish New Company as an effective independent competitor, well equipped to challenge El Paso for the California market.

Second, under the mistaken impression that the District Court had failed to accomplish what this Court's prior mandates had directed, the majority opinion sets out new, specific guidelines for future action below. It requires a strictly cash sale of the Northwest pipeline system and a

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* See *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129 (1967); *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651 (1964).

reallocation of El Paso's gas reserves. Both are potentially disastrous.

A cash sale will deprive any purchaser of the advantages, otherwise available to New Company, of a sound financial structure, with interest rates on debt and a cost of equity comparable to those historically available to El Paso and other established pipeline systems. New Company's additional interest costs alone will amount to $5,000,000 annually —and this burden will ultimately be borne by gas consumers.

The reallocation of gas reserves threatens to deprive California of the very fruits of the competition this case was designed to restore. It promotes neither lower gas costs nor new supply sources to meet California's mounting needs. It promises merely to re-route gas already dedicated to California service—and at an inevitably higher cost.

If it is possible to follow these guidelines at all, they will have harsh and obviously unintended consequences for gas consumers in both California and the Pacific Northwest. At best, they will needlessly drive up the price of natural gas. They may so severely handicap any purchaser of the Northwest system that it will be unable to compete effectively in California.

Thus the errors of the June 16 decision will have a serious, adverse, dollars-and-cents impact on the consuming public. They will impair, as well, the national interest in a sound and competitive natural gas industry.

POINT I

The Court has acted without giving the parties a hearing on the merits.

The majority states that "the parties concerned were afforded an opportunity to be heard on the question whether there had been compliance with the mandate." (Slip opin-

ion p. 1) They were not. The majority has overlooked the realities of the situation that obtained when counsel were before the Court on April 29, 1969.

The Utah Public Service Commission ("Utah") had brought Judge Chilson's decision to this Court in late November, 1968 by filing a Jurisdictional Statement. CIG (and at least ten other parties) had prepared to answer that Jurisdictional Statement with motions to affirm. Shortly before such motions were due to be filed, however, Utah itself moved under Rule 60 to dismiss its appeal. The office of the Clerk then informed counsel for CIG (and, we understand, counsel for other parties) that the filing of motions to affirm would be inappropriate.

On April 21, 1969, this Court took the unusual step of scheduling an argument on April 29 with respect to Utah's Rule 60 motion to dismiss and another motion "for a hearing" which William M. Bennett, Esq. apparently had filed some time before. (This latter motion had not been and has never been served on CIG or, so far as we can tell, on most of the other parties.) The nature and scope of the only hearing held by this Court in this case are defined by its own unambiguous order which reads:

> "The motion of appellant to dismiss the appeal under Rule 60 and the motion of William M. Bennett for a hearing are set for oral argument on April 29, 1969. The Solicitor General is invited to file a brief and present oral argument if he so desires." (22 L. Ed. 2d 751)

There was no reason to suppose from this order that the argument of April 29th was intended as a plenary hearing. The *only* unfavorable result that any party could possibly have anticipated was that this Court might, despite its own rules, decide to note probable jurisdiction and to set down the appeal for briefing and argument in the normal course. It was for that reason that those parties who appeared—

and many did not—addressed themselves only to the procedural issues framed by the Court's order.*

When the Court went to the merits in these circumstances, it failed to apply to itself the standards of appellate procedure which it has required of lower courts. In *Garrison* v. *Paterson,* 391 U.S. 464 (1968), this Court reversed the Court of Appeals for the Tenth Circuit, holding

> "that where an appeal possesses sufficient merit to warrant a certificate [of probable cause], the appellant must be afforded adequate opportunity to address the merits, and that if a summary procedure is adopted the appellant must be informed, by rule or otherwise, that his opportunity will or may be limited.[2]" (391 U.S. at 466)**

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* The Court should not overlook the atmosphere in which the argument took place. Mr. Bennett's motion, and an earlier *ex parte* "report" which he had filed with the Court on or about March 24, consisted, in large part, of *ad hominem* attacks on the professional and personal integrity of the Solicitor General, of ranking officials of the States of Utah and California, and of other parties to the case. The dispatches of a syndicated newspaper columnist had given wide currency to these baseless charges and, indeed, had expanded upon them to implicate the President and the Attorney General of the United States.

The officials and other parties thus assaulted were under an obvious practical necessity to address themselves publicly to these contentions, however groundless, and only incidentally to the merits. See, *e.g.,* the oral presentation of the Solicitor General, which was essentially a discussion, not of the case, but of the intramural procedures of the Department of Justice.

** The included footnote is the Court's. It reads as follows:

> "2. In an effort to determine whether the merits had been addressed, and whether petitioner was on notice that they should be addressed in full, at the unrecorded hearing [of the court of appeals] on June 9, this Court solicited further submissions from the parties in this case. Petitioner replied that the merits had been raised only to the extent necessary to show grounds for a certificate of probable cause. Respondent replied that petitioner was given all the time he wanted. *Respondent was unable, however, to point to any rule or decision forewarning an applicant for a certificate of probable cause to make his argument on the underlying issues in full.*" (Emphasis supplied.)

The right of an appellant to notice and an opportunity to address the merits once he has surmounted the initial hurdle of establishing that he has an argument worth considering is, surely, equally the right of thirty-two appellees (and one unwilling appellant), the probable merit of whose cause has been judicially certified by the very decision appealed from.

It is not a procedural formalism that is involved in giving a hearing to the parties who made the record below and are familiar with the facts. The fundamental reason why the right to a hearing is normally accorded constitutional protection is that its denial in *any* case is likely to result in a misunderstanding by the court of the facts. Mistaken decisions are a predictable result.

The majority's treatment of El Paso's gas reserves is a case in point. The matter is of vital consequence to millions of gas consumers. The District Court's solution was acceptable to all parties, and the subject was not even mentioned in any brief or oral argument in this Court. Yet the Court has, on its own initiative, directed a changed allocation which threatens, not only to drive up the price of natural gas in California, but to weaken, rather than strengthen, the effect of any competition effort by New Company in the California market. (See pp. 19-22, *infra.*)

As a premise for its second ground for reversal—that the District Court failed to direct a "complete divestiture" —the majority states that "Neither appellants [sic] nor any party supporting the dismissal argues that the District Court did so. Rather they argue that the disposition made by the District Court was the best that could be made without complete divestiture." (Slip opinion p. 6) This state-

ment is wrong on the facts.* It also is wrong in its implication that any meaningful argument was had on this issue at all. No party had contended that the District Court's disposition was incomplete or a compromise. Utah's Jurisdictional Statement did not even mention the matter. No party could have inferred from this Court's order of April 21, 1969 that the matter was at issue.

The lack of any meaningful briefing on this point doubtless explains the Court's fundamental misconception of the decree below. And surely nothing else can explain its condemnation of the provision permitting New Company to assume—for no more than an instant of time—a portion of El Paso's debt. The propriety of this provision had never been questioned by anyone—for as we show (pp. 12-13, 16, *infra*), *it is designed to save New Company (and ultimately its customers) some $5,000,000 of interest expense a year.*

Notice to the parties that these matters were to be considered would have enabled them to bring the true facts to the Court's attention.

We respectfully submit that this Court cannot have intended to deny to litigants before it the right to be heard on this complicated matter. Nor can it have realized that it was passing upon the merits of the decision below before the substance and effect of that decision had been accurately presented to it.

Only a reconsideration after a proper hearing can remedy the error.

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* CIG, for example, commented in its memorandum dated April 24, 1969:

> "Moreover, the decree, if implemented, will sever El Paso completely from any hint of continuing control of or influence over the operations of the Northwest system." (p. 7)

We did not then develop the point (as we now do at page 8-13 *infra*), but only because, as far as we were aware, no one was then contending otherwise.

POINT II

The Court did not have before it the full decision of the District Court.

The Court should recall its opinion and order of June 16 because it did not have before it, when it acted, the full decision of the District Court. There was omitted from the record transmitted by the District Court Clerk in Salt Lake City a crucial and integral portion of the divestiture plan adopted below. It demonstrates that the District Court's plan *does* provide for complete divestiture and that the majority's pivotal finding to the contrary (slip opinion p. 4) is erroneous.

CIG is filing simultaneously with the present petition a motion under Rules 32 and 35 for leave to supplement the record. The motion seeks to make available a copy, certified by Judge Chilson, of the "Implementing Documents" which constitute the detailed provisions implementing the divestiture decree involved in this appeal.*

The Implementing Documents were negotiated in compliance with the District Court's order of June 21, 1968 (R. 2639; see also 291 F. Supp. at 32) and were filed and served on all parties in early August, 1968. Comments were had from all interested parties, which were the subject of a full hearing on August 23, 1968 (Tr. 9,952-11,048; see also R. 2741). As a result, the District Court ordered certain modifications which were reflected in amendments filed and served on October 1, 1968. The Implementing Documents as thus amended were approved by the District Court by

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* The Implementing Documents consist of a joint statement by CIG and El Paso counsel transmitting them to the District Court and the parties, a "Proposed Agreement" among CIG, El Paso, and New Company, various exhibits and schedules thereto, and six pages of "Restrictive Provisions". In the copy now being supplied to this Court, this material is consecutively paginated from 1 to 155; it is sometimes cited in this petition as "I.D. p. ".

order dated November 7, 1968, an order which also has been omitted from the record and is being supplied by CIG's motion under Rules 32 and 35.

The supposedly complete record docketed here (see this Court's Rule 12) when Utah filed its Jurisdictional Statement in late November, 1968 omitted, apparently by inadvertence, all of the 155 pages of the Implementing Documents except for a few pages of amendments (R. 2908), unintelligible standing alone.* Had these documents been before this Court during the deliberations leading to its Opinion and Order of June 16, the majority's fundamental misunderstanding as to the nature and effect of Judge Chilson's divestiture plan would have been avoided.

For example, the majority quite obviously believes that El Paso may be able at some later date to convert New Company's non-voting Preferred Stock into a substantial common stock interest in New Company. (Slip opinion p. 3) But, as the Implementing Documents make clear, not only is the Preferred Stock *never* convertible while held by El Paso, its officers, directors or significant stockholders (I.D. pp. 151-52)—*it is not convertible into stock of the New Company at all.* It is exchangeable only for common

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* CIG has had no prior occasion to call this omission to the attention of the Court. It became aware of the absence of the Implementing Documents last winter while drafting its motion to affirm in response to Utah's Jurisdictional Statement. CIG planned to submit with that motion a companion motion to make the Implementing Documents available to the Court. The copy of the Implementing Documents we presently are tendering was certified by Judge Chilson on February 19, 1969 with that earlier filing in view.

Before the motion could be made, Utah moved under this Court's Rule 60 to dismiss its appeal. Rule 60 normally operates automatically, and, in the wake of the Utah filing, the Clerk's office informed CIG counsel that no further filings were desired. When the Court later entered in this Docket its order of April 21 which set down Utah's Rule 60 motion for argument, nothing indicated that matters to which the Implementing Documents are pertinent were at issue.

stock of CIG (I.D. pp. 12, 83-99), a broadly owned company, the stock of which has been listed for many years on the New York Stock Exchange.

The majority opinion goes on to say that, "What the conversion ratio will be is not known * * *." (Slip opinion p. 3) The parties and the court below, however, knew it to be 0.35 shares of CIG Common Stock for each share of New Company Preferred, as specifically set forth in the Implementing Documents. (I.D. p. 12) This is more than a matter of mere detail, since it contributes directly to New Company's financial strength.

Moreover, the Court's knowledge of the circumstances under which the exchange privilege can be exercised was limited to the vaguest of hearsay: "*it is said*, there will be provisions to restrict El Paso control over the New Company." (Slip opinion p. 3 (emphasis supplied)) The Implementing Documents, however, make it plain that neither New Company nor CIG can ever come under the influence, let alone the control, of El Paso.

The Implementing Documents contain six pages of detailed "Restrictive Provisions" forming a part of the decision below (I.D. pp. 150-55), which we are reproducing, for the Court's convenience, as an Appendix to this Petition. They make clear that, upon the transfer of the Northwest system assets to New Company, El Paso's influence over those properties and the related business, will end—immediately, totally, and permanently.*

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* Moreover, pending the closing (which is to occur promptly upon receipt of the necessary appellate and regulatory approvals (I.D. p. 14)), CIG is entitled under the Implementing Documents to utilize the facilities of the Northwest system (I.D. pp. 45-51) to compete for the California market. As long ago as October, 1968, CIG entered into preliminary agreements with California distributors looking towards a new pipeline to that State. (See exhibit to CIG memorandum to this Court dated April 24, 1969.) CIG was actively negotiating with Canadian interests for a supply of gas to be transported from the Northwest Territories and delivered to New Company at the international frontier in the State of Idaho when this Court's decision of June 16 intervened.

The terms of the Preferred Stock, set forth in the Implementing Documents, are so designed that El Paso will be compelled, as a matter of economic necessity, to dispose of it as soon as possible, and El Paso has undertaken to do just that (Tr. 10,028). The Preferred Stock's initial 6% dividend rate is already below market rates; five years after issue it will drop to 5% (I.D. pp. 74-75). The true value of the stock can never be realized by El Paso except through its disposition to independent third parties who can, unlike El Paso, exercise the exchange privilege and become CIG stockholders. El Paso's temporary ownership of non-voting preferred stock is a financing device—of particular value to New Company, see pages 17-18, *infra*—and nothing more.

Thus the District Court did not ignore the teachings of *United States* v. *E. I. du Pont de Nemours & Co.,* 366 U.S. 316, 327-28 (1961). *Du Pont* did not require the instantaneous sale of the chemical company's vast holdings of General Motors stock. It recognized that reasonable mechanical flexibility was compatible with "complete divesture," provided that, there as here, the antitrust violator's instrument of control, a voting interest, was eliminated immediately and it was clear that it would be out of the picture entirely in a relatively short time (in *du Pont* ten years) (366 U.S. at 335).

In addition, the majority, without the Implementing Documents before it, could not be aware that it had seriously misapprehended the nature and effect of New Company's assumption of El Paso's debt. From the Implementing Documents it is clear that the debt assumption neither "helps keep the two companies in league" nor creates or perpetuates a financial connection between them.

El Paso's outstanding debt totals over $800,000,000 and at January 1, 1967 carried an average composite interest rate of 5.26% (El Paso Ex. 1, p. 11, Tr. 235). The Implementing Documents provide for the *complete transfer*

of $158,000,000 of El Paso's debt (the portion of El Paso's total debt ultimately determined to be properly applicable to the Northwest system) (I.D. pp. 11, 110) to New Company, **as follows: El Paso bonds and debentures in that** amount, drawn ratably from El Paso's various outstanding issues, will be delivered by their holders to New Company in return for the latter's own bonds and debentures having similar terms and conditions (except for a ⅛% increase in interest rates)—thus permitting the release of the Northwest system properties from the lien of El Paso's mortgage. The original El Paso securities will then be cancelled. (I.D. pp. 11, 16-17)

The debt assumption is simply a mechanical device to facilitate the closing of transfer of title to the properties; it is satisfied the moment it arises—*at the same closing*—by New Company's issuance of its own bonds and debentures directly to El Paso's creditors. New Company's connection with El Paso's debt thus arises and is severed in a scintilla of time. The process enables New Company to obtain its debt financing on terms comparable to those obtained by El Paso over a long span of years, during which interest rates were far more favorable than those prevailing today. It will save New Company an estimated $5,000,000 of annual interest costs.

Surely, the fact that New Company and El Paso initially will have the same group of creditors—primarily insurance companies and pension retirement funds, which traditionally hold substantial quantities of pipeline debt securities for investment—does not put the two companies "in league" (*cf.* slip opinion p. 7). Their respective debts will be distinct and separate, with no co-obligations, no overlapping security interests, no retained equities. New Company will no more be "in league" with El Paso than with any other debtor of similar creditors—than with, for example, a Boston real estate developer whose mortgages are held by the Metropolitan Life Insurance Company.

The Implementing Documents which spell out these arrangements have not before been available to this Court. The Court has in the past recalled its decisions for reconsideration where it has belatedly learned of significant gaps in the record which had been before it. See *Chicago and Vincennes R.R.* v. *Fosdick*, 106 U.S. 47, 80-82 (1882); *cf. Ambler* v. *Whipple*, 90 U.S. 278, 282 (1874).* It has done so because of the importance of having the true facts before ruling on the issues. It should do so again here.

POINT III

The District Court's divestiture plan serves the public interest; a cash sale will injure it.

As we have shown, the Court has clearly misunderstood the nature of the divestiture plan adopted by the District Court. It has also profoundly misconceived its purpose.

A cash sale was not avoided simply "to ease the pinch" on El Paso's private interest, as the majority suggests (slip opinion p. 7). Rather, the financial arrangements adopted were specifically designed to further and protect the public interest. Ironically—and surely unintentionally—the cash sale requirement substituted by this Court not only fails to promote those interests, but will frustrate them.

The Implementing Documents show that the fair value of the assets to be divested—established by arduous arm's

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* In other circumstances, the Court has historically been unwilling to decide matters when there is even a possibility that the record may be incomplete with respect to them. See, *e.g., Mishkin* v. *New York*, 383 U. S. 502, 512-13 (1966); *Halbert* v. *United States*, 283 U.S. 753, 764 (1930); *cf. Flournoy* v. *Wiener*, 321 U.S. 253 (1944).

length bargaining—is about $258,000,000.* The legitimacy of this figure has been disputed by no one.** Thus, **a final resolution of this case requires the complete divestiture of assets worth on the order of a quarter of a billion dollars.**

This is an enormous sum of money. To raise it (whatever the form of its payment to El Paso) inevitably will require financial arrangements of great complexity—arrangements which will determine New Company's financial strength and competitive potential for years to come.

The financial aspects of the divestiture decreed by the District Court were carefully formulated to insure that (1) New Company will have a capital structure comparable to the one the former Pacific Northwest Pipeline Corporation might be enjoying today if it had not been acquired by El Paso, (2) New Company can raise the vast sums of additional capital necessary for a new pipeline to California on terms at least as favorable as its competitors, (3) customers of the Northwest system will be protected against needless rate increases in the process, and (4) divestiture can be carried out promptly and certainly, free of the uncertainties and additional expense attendant upon fund

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* The calculations of the Implementing Documents and the figures cited from those Documents in this petition are as of April 30, 1968. Adjustments, based on formulae set out in the Implementing Documents, will be made at the closing to reflect changes in the plant of the Northwest system occurring after that date. (I.D. pp. 2, 10-12, 109-10)

** The only questions raised before this Court concerning the amount of the price to be paid to El Paso appear in the virtually identical texts set out at pages 24-25 of Mr. Bennett's final brief and at pages 8-9 of the *amicus* brief. Both sources assert, without citation to the record and in flat contradiction of the actual facts, that CIG agreed to pay $300,000,000, including an equity component of $130,000,000. This, they allege, is $30,000,000 too high and proof, as Mr. Bennett phrases it, that "crime does pay under the Clayton Act." Ironically, CIG's actual payment is to be *lower*, by almost $12,000,000, than the amount which Mr. Bennett and the *amicus* brief implicitly acknowledge would be reasonable.

raising in the prevailing state of the nation's financial markets.

None of these goals can be achieved by a cash sale of the properties.

The District Court was at pains to insure that the financial arrangements of the divestiture would not deprive New Company and its customers of the benefits of El Paso's presently favorable debt structure, which carries a composite average interest rate of 5.26%.*

This is accomplished under Judge Chilson's plan by the "assumption"—followed by an immediate novation in the manner previously described—of New Company's ratable share of El Paso's debt.

A cash sale, on the other hand, would have appalling consequences for New Company and, ultimately, the consumers it serves. To begin with, it is problematical whether, in the present period of active credit restraint, funds in such an amount could be raised at all. At best, divestiture may be delayed by the uncertainties of cash financing. But this question aside, it is virtually certain that, if borrowed, the funds would command an interest rate of at least 8½%.**

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* As of January 1, 1967. (El Paso Ex. 1, p. 11, Tr. 235) Since that date, this composite average interest rate is understood to have increased by approximately ¼ of 1%.

** The bank prime rate jumped in the late spring of this year to 8½%. CIG itself has since offered (on June 24) and sold $30,000,000 of first mortgage bonds priced to yield 8% (SEC Reg. No. 2-33117), and the Michigan Wisconsin Pipeline Company, a unit of the American Natural Gas Company system, has offered on June 30) $40,000,000 of first mortgage bonds priced to yield 8.125% (SEC Reg. No. 2-33216). Both issues were rated "A" by Moody's. *Prior* to the latest prime rate increase, Texas Eastern Transmission Corporation offered (on June 4) $50,000,000 of Ba-rated debentures priced to yield 8.55% (SEC Reg No. 2-32965). Underwriting and sales expenses result in a debt cost to the borrower of about .1 to .2 of one percent more than the yield to the public. To create market demand, debt issues of a new company operating the Northwest system—with untried management and no financial history—would undoubtedly require a higher interest than those of seasoned gas transmission companies.

This would mean to New Company, of course, interest costs of some $5,000,000 a year more than those payable if El Paso's debt is rolled over into debt of New Company in the manner specified by Judge Chilson. One need not follow through the intricacies of a rate-making proceeding to realize that, if New Company is not to go bankrupt, these increased interest costs must be recovered through increased rates charged the company's customers.

As for the equity portion of a New Company's capital, this, too, cannot be raised in today's markets on terms as favorable as those an independent Pacific Northwest Pipeline Corporation might have enjoyed at an earlier time. Investors no longer will accept high price-earnings ratios when purchasing utility common shares.*

The District Court's plan solves the problem in two ways. First, New Company's common equity will be furnished by CIG, principally in the form of about 1,750,000 shares of CIG's own common stock, which will be held as an

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* A recent tabulation appearing in 83 *Public Utilities Fortnightly* No. 13, June 19, 1969 at page 102 indicates that the average price-earnings ratio on May 15, 1969 of the common stock of the 30 largest publicly owned pipeline and integrated system gas utility companies was only 13.6. Stock market price averages have broken sharply since that time. Another tabulation at page 99 of the same issue shows that sixteen electric utility preferred stock issues came to market in 1968. None was sold at a price producing a yield to the purchaser of less than 6.2%, and many yielded close to 7%. In the first few months of 1969, *before* the recent jump in the bank prime rate to 8½%, nine new issues of electric utility preferred stock were sold. None yielded less than 7%.

Every divestiture proposal presented to the District Court had to face the same problem of financing. *All* contemplated "assuming" the debt in some form or other, and most applicants for the divested property expected to buy only a small part of El Paso's equity interest, with the remainder going into an "insulated" voting trust. (See 291 F. Supp. at 9-13.) Non-voting preferred, with a declining dividend feature which will force its early disposal to third parties, accomplishes a complete divestiture far more surely than anything such applicants were interested in.

additional asset by New Company for at least five years, until the conversion rights of the New Company Preferred become operative. By reason of the accounting treatment involved, CIG can, in effect, supply New Company's common equity at a substantially lesser cost than would be required—by CIG or anyone else—on an equivalent amount of cash. Second, the non-voting Preferred Stock, yielding only 6% at issue and subsequently dropping to 5%, will give New Company the initial advantage of an additional layer of equity at most favorable terms. Moreover, upon its conversion into CIG common stock, the Preferred will have been retired by New Company without any cash outlay.

As a result, New Company's capital structure will be substantially strengthened, providing a more favorable foundation for the additional capital requirements of a California project and the foreseeable growth of the existing Northwest system than could be achieved under any alternative proposed below—or under the cash sale ordered by this Court. The favorable debt-to-equity ratio resulting from the District Court's divestiture plan will increase the amount of capital which New Company can raise through debt financing, improve the terms on which it can be obtained, and thereby enhance its ability to compete for a major project to California.

Compared to the measures adopted below, the consequences of the cash sale directed by this Court would be disastrous. The Court surely could not have intended to burden New Company with the weaker capital structure, the higher-cost debt, and the more expensive equity which will be the practical consequences of its recent opinion.

Nor could the Court have intended to subject New Company's customers to the threat of increased rates implicit in its decision. Yet a utility's earnings must provide both interest on its debt and a proper return on its equity in order to attract new capital; those earnings can only come from the rates charged the consumer.

The increased costs of capital flowing from a cash sale will inevitably be felt by natural gas consumers throughout the Pacific Northwest. Although the extent of the "pinch" on the gas consuming public cannot be exactly foretold, the threat is no small one. CIG estimates that a rate increase of over $11,000,000 a year may be necessary to cover the higher interest costs and higher equity costs which would be required were cash substituted for the consideration ordered by the District Court.

Under the District Court's plan New Company will begin life with a capital structure comparable to that of a mature gas transmission company. At its inception, New Company will enjoy, as was intended, the equivalent of the "financial history" the old Pacific Northwest Pipeline Corporation might have had today if it had not been acquired by El Paso. This Court's requirement that New Company's capital be raised in today's money market can only serve to handicap its ability to compete with established transmission companies — like El Paso — which have capital structures reflecting the cheaper money available in easier times.

Judge Chilson sought to protect the public interest. That interest requires a reconsideration of this Court's decision of June 16.

POINT IV

The District Court's allocation of gas reserves is not only consistent with, but is well designed to further, the purposes of the mandate.

The majority of this Court also found that the District Court's decree failed to "apportion gas reserves in a manner consistent with the purposes of the mandate." (Slip opinion p. 4) That purpose is, of course, "to restore competition in the California market." (Slip opinion p. 5.) The majority's criticism is plainly mistaken.

Mr. Justice Douglas's much quoted description of the nature of competition in the gas transmission business in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964), makes the central point that:

> "* * * Once the [Federal Power] Commission grants authority to construct facilities or to transport gas in interstate commerce, once the distributing contracts are made, *a particular market is withdrawn from competition.*" (376 U.S. at 660) (Emphasis added.)

Just as the particular market segment is withdrawn from effective competition once service has been brought to it, with Commission approval, so, too, the related gas supply is no longer freely available for use in competing for new increments of demand.

It is undisputed in this record that the bedrock minimum requirements for an entirely new pipeline project to California are a daily market of 350,000 to 400,000 MCF and reserves of from three to five trillion cubic feet. (Tr. 2664-65, 3006) It likewise is undisputed that free reserves of this magnitude, uncommitted to the existing FPC-certificated services of El Paso's northwest and southern pipelines, simply do not exist anywhere in the El Paso system. (See Tr. 739, 751-52, 756, 2383, 3900-01.) Yet it seems clearly to be the Court's intention that in any new apportionment reserves be allocated to New Company "sufficient to meet the old Northwest's existing requirements and those of a California project", and that such additional reserves, beyond those awarded by Judge Chilson's decree, come primarily from the San Juan Basin. (Slip opinion p. 4)

None of the many parties below suggested that such an allocation was either feasible or desirable. No one before this Court even questioned the District Court's allocation of gas reserves. The reason is simply that Judge Chilson's solution of the reserve problem is, when ap-

praised in the light of the objective of creating new competition in California, the best that *can* be achieved within the realities of the natural gas industry.

In the face of the unyielding arithmetic of reserves and commitments—the requirements of the public interest—Judge Chilson decreed a division of El Paso's reserves which: (a) protected the existing customers of both the northwest and southern systems from the diversion of reserves earmarked for their use; and (b) required both El Paso and New Company to seek new reserves if they are "to be competitors for future increments to the California market." (291 F. Supp. at 20.)

Competition by a new pipeline to California should provide the consumers of that State with *more* gas to meet their steadily increasing demands, or *cheaper* gas, or both. Judge Chilson sought, by his division of reserves, to assure the delivery of additional gas while avoiding an increase in the delivered cost of supplies already earmarked for California.

To divert to New Company for use in its prospective California project gas reserves already committed to the needs of that State serves neither of these objectives. Such a diversion contributes nothing to California's overall supply. It simply reroutes, at predictably higher costs to the consumers, gas which they have had every reason to believe was already securely theirs.

Pipeline construction costs, like construction costs generally and interest costs, have been trending upward for many years. Amortization of capital charges is one of the major elements of cost involved in the delivery of natural gas. It makes little sense to divert gas, already earmarked for delivery to California in a pipeline long since built, to a new pipeline to California to be built at the much higher costs of the early 1970's. The delivered cost

of (and, therefore, the rates for) such diverted gas must climb.*

The "extra" San Juan Basin reserves which the majority feel Judge Chilson should have awarded to New Company would be a hindrance to New Company's fight for a meaningful place in the California market for another reason. Its competitive efforts and resources would, of necessity, have to be directed for years to come toward a new pipeline from San Juan to Southern California to utilize such reserves.

Whatever may have been the case a decade or more ago, there are, according to the consensus of qualified opinion, no significant unfound reserves in the San Juan Basin (Tr. 739, 751-52, 756, 2383, 2669, 3900-01). Even if New Company were to receive from El Paso reserves sufficient to put together a minimum project from San Juan, New Company would have to look elsewhere to find additional reserves to compete for increments of demand coming into existence thereafter. A first-priority project from other, potentially richer sources will yield far greater returns in terms of establishing New Company's long-range competitive potential, as well as assuring California of access to desperately needed sources of new gas supply.

Gas from a new source—Canada—was at the heart of the competitive threat which the former Pacific Northwest Pipeline Corporation posed to El Paso in the 1950's. See *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 654-55 (1964). It was access to a new source—Canada—from which California was barred by the illegal merger. It is a new source of gas which should be in the forefront of New Company's competitive plans.

* Furthermore, to the extent that the diversion introduces now, or at some later date, an element of unused capacity in El Paso's southern system, the diversion must raise the unit delivered cost of the remaining gas, since the *same* fixed charges must be recovered from a lesser volume of deliveries. (See Tr. 739.)

On June 23rd of this year, Canadian interests (together with a firm of American engineering contractors) announced publicly plans for a new pipeline from the Fort Liard area of the Northwest Territories which initially will deliver 800,000 MCF/day to the international frontier in the State of Idaho. See *Wall Street Journal*, June 24, 1969, p. 5, col. 2 (Eastern edition). Prior to June 16 CIG was actively negotiating, on behalf of New Company, for gas for a California project from this source. (*Ibid.*) Any purchaser must be free to pursue such negotiations or it will have lost, in advance, a large part of its freedom of action.

The divestiture decree should not strip New Company's new management of the discretion needed to compete effectively. Judge Chilson's decree does not do so.

Conclusion

CIG asks by this petition and motion that the Court grant it and the other parties a hearing on the merits before finally deciding these complex matters, so important not only to the litigants but to the general public.

We ask that the Court permit the full record to be placed before it, so that it can consider the decision of the District Court in the light of the provisions of the Implementing Documents. These are a vital part of the decree not previously available to this Court.

We ask the Court to consider whether or not, through mistake, serious and unintended errors have been made in its decision of June 16, harmful to the general public as well as to private interests.

We do not believe that the final curtain should be lowered on this cause without such further consideration.

Respectfully submitted,

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July 11, 1969

Certificate of Counsel

I hereby certify, pursuant to Rule 58(1) of the Rules of the Supreme Court, that the foregoing Petition and Motion is presented in good faith and not for delay.

July 11, 1969

JOHN F. SONNETT
Attorney for Petitioner,
Colorado Interstate Corporation

APPENDIX

Reproduced on the pages following is the text of the "Restrictive Provisions" constituting pages 150-55 of the "Implementing Documents" being presented to the Court by separate motion of Colorado Interstate Corporation under Rules 32 and 35. See pages 8-10 of the foregoing Petition.

[150]* Restrictive Provisions

El Paso and Colorado Interstate have agreed, subject to the approval of the Court, that the following restrictive provisions should be included in the Court's Final Order in this cause.

1. *Definitions*

a. The term "El Paso" shall mean El Paso Natural Gas Company, a Delaware corporation, or any successor.

b. The term "El Paso Affiliate" shall mean any Person directly or indirectly controlling, controlled by, or under common control with El Paso.

c. The term "Immediate Family" shall mean with reference to any individual person, the spouse, descendants, ascendants, brothers and sisters of such person.

d. The term "Person" shall mean any individual, partnership, association, joint-stock company, business trust, or organized group of persons, or other legal or business entity whether incorporated or not; or any receiver, trustee or other liquidating agent of any of the foregoing in his capacity as such.

e. The term "Holder of Record Only" shall mean, with reference to shares of stock of any corporation, any person who holds such shares solely of record as broker, pledgee, trustee, agent or otherwise in a representative capacity which carries no beneficial interest in such shares.

[151] f. The term "Northwest" shall mean Northwest Pipeline Corporation, a Delaware corporation, or any successor.[**]

* Each number appearing in brackets in this fashion indicates the start of the similarly numbered page in the certified copy of the "Implementing Documents" being filed for inclusion in the record.

** "Northwest" is the corporation generally identified as "New Company" in the papers filed in this Docket.

g. The term "Northwest Preferred Stock" shall mean the preferred stock of Northwest to be issued to El Paso in exchange (in part) for the assets to be divested by El Paso pursuant to the plan of divestiture ordered by the Court.

h. The term "Original Issue Date" shall mean the date on which the shares of the Northwest Preferred Stock shall first be issued.

i. The term "Colorado Interstate" shall mean Colorado Interstate Corporation (formerly Colorado Interstate Gas Company), a Delaware corporation, or any successor.

2. *Restrictions Against Exchange of Northwest Preferred Stock*

a. Neither El Paso nor any El Paso Affiliate may exchange any Northwest Preferred Stock for Colorado Interstate Common Stock.

b. The Northwest Preferred Stock may be redeemed (at the option of the holder thereof) by Northwest for Colorado Interstate Common Stock only upon presentation to Northwest or its agent of a certification by the holder thereof (or, in the event such holder is a Holder of Record Only, a certification by the beneficial owner thereof) to the effect that such holder (or beneficial owner):

(i) is not an officer or director of El Paso or of an El Paso Affiliate;

[152] (ii) does not beneficially own, control or hold with power to vote, directly or indirectly, in excess of one-half of one per cent. (½ of 1%) of the then issued and outstanding shares of the common stock of El Paso;

(iii) is not a member of the Immediate Family of any officer or director of El Paso or, to the best of the information, knowledge and belief of such holder, of any person who beneficially owns, controls or

holds with the power to vote, either directly or indirectly, in excess of one-half of one per cent (½ of 1%) of the then issued and outstanding common stock of El Paso;

(iv) is not acting for, or on behalf of any Person hereby precluded from redeeming Northwest Preferred Stock; and

(v) is not acting in concert, agreement or understanding with any other Person, but is acting in good faith solely in such holder's (or in such beneficial owner's) own behalf.

3. *Restrictions Against Acquisition of Northwest Common Stock and Colorado Interstate Common Stock*

No person who is an officer or director of El Paso or of an El Paso Affiliate, shall be permitted to purchase or retain any of the common stock of Northwest or to purchase or [153] retain more than one-tenth of one per cent (0.1%) of the then outstanding common stock of Colorado Interstate; nor for a period of ten years from the Original Issue Date shall any Person who, in the aggregate with members of his Immediate Family and with any Person with whom he is acting in concert, agreement or understanding and with any Person for whom or on whose behalf he is acting, beneficially owns, controls or holds with power to vote, either directly or indirectly, in excess of one-half of one per cent (½ of 1%) of the then outstanding common stock of El Paso, be permitted to purchase or retain any of the common stock of Northwest nor to purchase or retain more than five per cent (5%) of the then outstanding common stock of Colorado Interstate. The Attorney General of the United States shall have access to the stock transfer of books and records of El Paso, Northwest and Colorado Interstate for the purpose of enabling

him to enforce compliance with this provision. Nothing herein contained shall extend to any Holder of Record Only of stock of El Paso, Northwest or Colorado Interstate.

4. *Further Restrictions*

a. Except as contemplated in the plan of divestiture ordered by the Court, El Paso and its Affiliates are hereby enjoined from acquiring any capital stock or financial interest whatsoever in Colorado Interstate or in Northwest or any assets [154] of either, except such assets as might pass between El Paso and Colorado Interstate or between El Paso and Northwest in the ordinary course of their respective businesses.

b. For a period of ten years from the Original Issue Date, and except as contemplated by the plan of divestiture ordered by the Court, El Paso shall not acquire or hold after such acquisition, directly or indirectly, any of the outstanding common stock of Westcoast Transmission Company, Limited or any of the outstanding common stock of Northwest Production Corporation.

c. El Paso shall not have any person as an officer or director who is at the same time:

(i) an officer, director or employee of Northwest or Colorado Interstate;

(ii) the owner of any common stock of Northwest or more than one-tenth of one per cent (0.1%) of the outstanding common stock of Colorado Interstate or a person all members of the Immediate Family of which own in the aggregate more than one-tenth of one per cent (0.1%) of the common stock of Northwest or more than two-tenths of one per cent (0.2%) of the common stock of Colorado Interstate.

d. El Paso shall not employ, during a period of five (5) years from the Original Issue Date, any employee of Northwest without first obtaining the consent in writing of Northwest.

[155] e. El Paso, its Affiliates, officers and directors are hereby enjoined from exercising the voting rights accorded the holders of the Northwest Preferred Stock as set forth in subparagraph (b) of paragraph 5 of the Certificate of Amendment of the Certificate of Incorporation of Northwest attached as exhibit   to the Agreement dated   , 1968, between El Paso, Colorado Interstate and Northwest on file in this cause, should such voting rights arise while such stock is held by them.

Amendment to Implementing Documents page 155

The cross-reference in paragraph "e", quoted immediately above, is to the inapposite material appearing at I.D. pp. 65-66. A revision of I.D. p. 155 was included in the amendments to the Implementing Documents which El Paso and CIG filed with the District Court and served on the parties on or about October 1, 1968. (See R. 2908.) The revised page 155 which Judge Chilson approved, along with the remainder of the Implementing Documents, by order dated November 7, 1968 reads as follows:

[155] e. El Paso, its Affiliates, officers and directors are hereby enjoined from exercising the voting rights accorded the holders of the Northwest Preferred Stock as set forth in subparagraph (a) of paragraph 9 of the Certificate of Designation of Northwest attached as Exhibit III to the Agreement dated   , 1968, between El Paso, Colorado Interstate and Northwest on file in this cause, should such voting rights arise while such stock is held by them.[*]

f. Neither El Paso nor any of its Affiliates, officers or directors shall, while holding any shares of Northwest Preferred Stock, unreasonably or arbitrarily refuse to cast an affirmative vote for, or to consent to, any action proposed

* The cross-reference is to the material appearing at I.D. pp. 102-04.

to be taken by Northwest and requiring the affirmative vote or consent of all or any portion of the holders of Northwest Preferred Stock, including without limitation any action referred to in Paragraph 5 of Article II of the Certificate of Amendment of the Certificate of Incorporation of Northwest, attached as Exhibit II to the Agreement dated , 1968 between El Paso, Colorado Interstate and Northwest on file in this cause [*], or in Paragraph 7 or 8 or subparagraphs (b) or (c) of Paragraph 9 of the Certificate of Designation of Northwest, attached as Exhibit III to said Agreement [**]. In the event of any such refusal, Northwest may apply to this Court for such relief, as may be appropriate under the circumstances.

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* The cross-reference is to the material appearing at I.D. pp. 64,67.

** The cross reference is to the material appearing at I.D. pp. 99-101 and 105-06.

NO. 776

IN THE

SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1968

UTAH PUBLIC SERVICE COMMISSION, *Appellant*

v.

EL PASO NATURAL GAS COMPANY, ET AL., *Appellees*

On Appeal from the United States District Court for the District of Utah.

PETITION FOR REHEARING

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NEVADA PUBLIC SERVICE COMMISSION

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PETITION FOR REHEARING

The Nevada Public Service Commission (hereafter sometimes referred to as Nevada) prays that this Court grant rehearing of the captioned case, on the grounds below:

I.

Nevada, as the only state which will be served by both the New Company and El Paso Natural Gas Company (El Paso)

after divestiture, has a legitimate concern that both of these companies are treated in a manner consistent with the public interest in divestiture.

II.

It is the opinion of the Nevada Public Service Commission that this Court's decision will have adverse consequences for the consumer served by both the New Company and El Paso, without any corresponding benefit to competition.

III.

Nevada respectfully submits that the new standard for the "reallocation" of gas reserves handed down by this Court is uncertain of meaning. But if it is intended to direct El Paso to divest enough domestic reserves to the New Company to support a new project to California, Nevada wishes to point out the probable consequences. Nevada is unaware of any gas reserves in the southwestern United States that are available for this purpose, and therefore any additional gas divested to New Company would be at the expense of El Paso's present customers. Three effects might be expected to flow from such a severance:

A. New Company would simply be collecting higher rates for delivering precisely the same gas.

B. El Paso's rates would inevitably be increased. This would occur because less gas would then be transmitted to the same facilities, resulting in idle capacity and increased unit costs of transmission.

C. El Paso's ability to serve the future needs of its present

customers, even at higher rates, may be seriously impaired. The domestic gas supply shortage is already one of national urgency.

IV

Generally, this Court's decision would run counter to long-range regulatory policy. Instead of bringing Canadian gas to California, and adding to the nation's total gas supply, New Company would be forced to use domestic reserves for that purpose which would not put it "in the same relative competitive position vis-a-vis El Paso in the California market as that which Pacific Northwest enjoyed immediately prior to the illegal merger." It was always the intention of Pacific Northwest to use Canadian gas in its proposed service to California. In short, it is far sounder for New Company, like Pacific Northwest, to use the vast Canadian resources that are available to it for any project to California. This Court's decision precludes that alternative. Any additional gas reserves divested to New Company will come subject to a contractual device known in the industry as a "take or pay" provision. Under such a provision, a company must pay for the gas whether it actually uses the gas or not. Therefore, New Company could not afford to leave these reserves idle even if it determined that it would otherwise be advantageous to use Canadian reserves.

V

Of equal concern to Nevada is this Court's apparent ruling that New Company will not be allowed the benefit of its fair share of El Paso's low-cost debt. It is respectfully submitted that this Court could not have been aware of the consequences of this holding, which, if implemented, will mean immediate and substantial rate increases to New Company's customers.

VI

Public policy dictates that gas transmission companies have a high debt-equity ratio, because debt is the lower-cost component of capitalization. Capital costs go into a pipeline's cost of service, which must be covered by its revenues, and thus a high debt-equity ratio means lower costs to the consumer. The debt El Paso was ordered to divest to New Company had an average weighted interest cost of 5.26%.

VII

New debt raised in lieu of that existing debt will carry a much higher interest rate. Rough calculations show that a minimum three percent increase on New Company's $170,000,000 debt structure will result in additional costs to the New Company of over $5,000,000 a year. The gas consumer will be required to bear this burden. Furthermore, the imposition of this burden bears no visible relation to the end sought to be served, which is the reinstatement of competition. The effect of what this Court has done is to build into the New Company the highest debt costs of any gas transmission company in the nation. Obviously, this will limit New Company's ability to engage in price competition, both for new projects and with alternate energy supplies.

VIII

Nevada believes that the truth of all of the arguments set forth above could be demonstrated to the Court in a hearing on the merits of this case. Nevada urges this Court not to summarily dispose of this immensely complicated case, with which the public interest is so directly bound, without a hearing on the merits. Therefore, Nevada respectfully requests this Court to grant

rehearing and give to the parties an opportunity to brief and argue this case on its merits.

Dated this 10th day of July, 1969.

Respectfully submitted,

/s/ Harvey Dickerson

HARVEY DICKERSON
Attorney General of Nevada

Attorney for Petitioner

NEVADA PUBLIC SERVICE COMMISSION

CERTIFICATE

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay.

/s/ Harvey Dickerson

HARVEY DICKERSON
Attorney General of Nevada

FILED

IN THE

Supreme Court of the United States

October Term, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION,

Appellant,

v.

EL PASO NATURAL GAS COMPANY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

October Term, 1968

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UTAH PUBLIC SERVICE COMMISSION,

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v.

EL PASO NATURAL GAS COMPANY, ET AL.,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

PETITION FOR REHEARING

SOUTHWEST GAS CORPORATION, ("Southwest Gas") intervenor below and appellee herein, respectfully petitions this Court for a rehearing of the above-styled cause pursuant to Rule 58 of the Rules of the Supreme Court of the United States, on the following grounds.

I.

SOUTHWEST GAS WAS DEPRIVED OF ITS RIGHT TO BE HEARD ON THE MERITS OF THIS CASE.

Southwest Gas shares the Supreme Court's desire for an early disposition of this case, which has kept the

Western United States gas market in a state of uncertainty for twelve years, but it respectfully urges that this Court's decision in this case deprived Southwest Gas of an opportunity to be heard on matters of surpassing importance to this petitioner.

The Court's order of April 21, 1969, indicated only that the appeal of the Utah Public Service Commission ("Utah") might be revived. Southwest Gas was opposed to that unusual procedure, because it earnestly hoped that this case was finally at an end and because it was satisfied with the result reached in the trial court. But it understood from the Court's order that the only question to be taken up at that hearing was whether Utah's appeal was going to be heard despite Utah's attempts to withdraw it, and Southwest Gas considered its interests on that narrow procedural point adequately represented by the Department of Justice, Colorado Interstate Gas Company ("CIG") and El Paso Natural Gas Company ("El Paso"). Southwest Gas did not understand that the merits of the case would be considered in any way at this hearing; yet it learned to its dismay on June 16 that this Court had disposed of the entire case in a manner completely different from the result reached by the trial court.

Southwest Gas respectfully submits that it had no actual or constructive notice that this Court intended to decide this case on its merits, and that its right, as an intervenor and an appellee, to be heard on the merits in this Court was foreclosed by the procedure employed by this Court.

II.

THIS CASE WAS NEVER HEARD ON ITS MERITS.

Although Southwest Gas was not represented at the hearing on April 29, it is obvious from the transcript of those proceedings, as from the briefs filed, that the merits of the case were barely touched upon. This is a case of great complexity, and it should not be decided without a full hearing.

III.

THERE IS NO GAS IN THE SAN JUAN BASIN THAT CAN BE REALLOCATED.

Most important, Southwest Gas urges upon this Court that its ruling regarding gas reserves cannot be reconciled with the facts. Southwest Gas will be uniquely affected by the fairness of any allocation of gas reserves, since it is the only intervenor in the case below that would purchase gas both from El Paso's Southern Division and from the divestee ("New Company") of El Paso's Northwest Division. Thus Southwest Gas cannot in any sense "win" this case as a consequence of a disparity in the allocation of reserves or any other benefits between El Paso and New Company; Southwest Gas can only "lose" if the divestiture results in the imposition of disproportionate burdens upon either El Paso or New Company.

It is a fact established in the trial court, and well known otherwise in the industry, that there are no known reserves of uncommitted gas in the San Juan Basin or elsewhere in that part of the United States. All the gas reserves in the San Juan Basin are under certificate and

are already committed to customers, including Southwest Gas. The trial court cannot reallocate what is not there.

Southwest Gas urges that this Court give all the parties to the appeal the opportunity to brief and argue the questions whether any "reallocation" could be accomplished without taking away, from companies such as Southwest Gas, gas already committed and flowing to them, and whether the 400,000,000 MCF per day of Canadian gas available to New Company does not give it excellent California capabilities; capabilities which are superior, in fact, to those possessed by Pacific Northwest Pipeline Company at the time it was acquired by El Paso.

IV.

THE RESTRICTIONS PLACED ON THE FINANCIAL TERMS OF THE DIVESTITURE WILL MAKE IT DIFFICULT TO GET A NEW COMPETITOR INTO OPERATION WITHIN A REASONABLE LENGTH OF TIME.

The proposal that the properties to be divested be sold for cash was considered in detail in the trial court, as was the exchange or "roll-over" of the debt. The exchange of debt was an integral part of each applicant's plan, and no applicant represented that it could purchase all of the equity in these properties for cash absent a public offering of the stock of the New Company. This involves a lengthy and highly uncertain financial procedure, which is completely at the mercy of the stock market. A stock-for-stock transaction is simpler and much faster. As the Court below found, "the stock ex-

change plan . . . is better suited (than the cash sale plan) to enable CIG to proceed promptly with the steps necessary to enable it to become a competitive factor in the California market . . ." *United States v. El Paso Natural Gas Company*, 291 F. Supp. 3, 30 (1968). Furthermore, the restrictions placed on the conversion and ownership of New Company's stock utterly remove any possibility of El Paso or its stockholders influencing New Company.

This Court's act in striking down the debt roll-over will have far-reaching ramifications. It will delay the date of divestiture because the applicants must now start from scratch to raise $170,000,000. It will inevitably result in higher rates to New Company's customers, of which Southwest Gas is one, because the higher cost of money raised at today's interest rates will significantly increase New Company's cost of service. It may even develop that New Company would not be a viable entity at all because of the squeeze created by the competitive pressure on fuel rates in the Northwest and New Company's higher debt service requirements.

This would be a high price to pay even to avoid some realistic possibility of an anticompetitive combination arising out of the debt roll-over. But Southwest Gas fails to see how the debt roll-over arrangement adopted below could possibly "help keep the two companies in league." Southwest Gas respectfully suggests that this Court did not fully understand that arrangement.

Southwest Gas respectfully submits that this Court should rehear this case so that the parties may be given

an opportunity to argue the issues raised in this Petition and fully develop the facts, to the end that consequences calamitous to Southwest Gas and its customers may be averted.

Respectfully submitted,

Charles H. McCrea
Lawrence V. Robertson, Jr.

By Charles H. McCrea
Charles H. McCrea

Attorneys for Petitioner
Southwest Gas Corporation

No. 776

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

UTAH PUBLIC SERVICE COMMISSION,
Appellant,

v.

EL PASO NATURAL GAS COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

PETITION FOR REHEARING
EL PASO NATURAL GAS COMPANY

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CITATIONS

No. 776

IN THE

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UTAH PUBLIC SERVICE COMMISSION,
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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

PETITION FOR REHEARING EL PASO NATURAL GAS COMPANY

EL PASO NATURAL GAS COMPANY [El Paso] hereby respectfully petitions this Court for a rehearing of its decision of June 16, 1969 and a hearing on the merits in the above styled cause, on the grounds and for the reasons hereinafter set forth.

I. EL PASO WAS NOT AFFORDED A HEARING ON THE MERITS OF THIS CASE

Fundamental fairness, this Court's Rules, and its prior decisions all require that a party be forewarned in some fashion if a court is going to pass on the merits of his claim, and require that he be given an opportunity to address himself to those merits. El Paso was not fore-

warned that this Court would pass on the merits of this case following oral argument on April 29, 1969, and it did not address itself to any but procedural questions. Accordingly, El Paso was denied an opportunity to brief or argue the merits.

On November 22, 1968, the Utah Public Service Commission [Utah] filed in this Court a Jurisdictional Statement which dealt solely with the question whether Colorado Interstate Gas Company [now Colorado Interstate Corporation; hereinafter CIG] was disqualified, for antitrust reasons, as a purchaser of the assets to be divested. On the morning of the final day on which motions answering that Jurisdictional Statement could be filed, Utah moved this Court to dismiss its appeal. El Paso had prepared and was ready to file a Motion to Affirm, but was informed by the Office of the Clerk of this Court that its Motion would not be received in view of Utah's Motion to Dismiss. Other appellees were similarly advised.[1]

Almost immediately, this Court began to receive ex parte communications from persons neither parties to nor representing parties to these proceedings, urging that this Court hold a hearing to determine whether a hearing on the merits should be held notwithstanding Utah's wish to withdraw its appeal. On the basis of the information thus communicated, on April 21 the Court ordered that a hearing be held on April 29. In relevant part, that order read:

> The motion of appellant to dismiss the appeal under Rule 60 and the motion of William M. Bennett for a hearing are set for oral argument on April 29, 1969.

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[1] Solicitor General, transcript of oral argument at April 29 Hearing in *Utah Public Service Comm'n v. El Paso Natural Gas Co.* [hereinafter Oral Argument] at 33; Statement of Position of Northwest Intervenors in Response to Court's Order Dated April 21, 1969, at 2; Memorandum of Colorado Interstate Corporation, filed April 24, 1969, at 3.

The first motion thus set for hearing dealt with the question whether there would be an appeal in the first place. Obviously, if the Court granted Utah's motion to withdraw its appeal there would be no appeal on file. The second motion to be heard involved the request of an outside party to be given a hearing on the merits of the appeal. Therefore the Court's order posed only two questions: whether the merits of the case should be heard at all, and, if so, whether Mr. Bennett should be heard on the merits.

As the order clearly stated, then, the April 29 argument was for the purpose of determining whether there would or would not be a subsequent hearing on the merits. Aside from the consideration that the parties to an appeal to the Supreme Court of the United States should be entitled to rely on the Court's own statement of what questions are before it, every circumstance surrounding this hearing led El Paso to conclude that the issues were only those indicated by the plain meaning of the Courts' own words.

First, in view of the unusual nature of the proceeding ordered by the Court,[2] it was taken for granted that the Court was concerned about the unusual questions — the propriety of Utah's agreement with CIG, the Department of Justice's decision not to pursue its appeal, and perhaps CIG's qualification to acquire the assets to be divested under the antitrust laws. Indeed, no other questions had been raised, except in a most peripheral and highly conversational way by Mr. Bennett, and this Court itself later declined to hold that his "papers" properly presented the question of compliance with *Cascade*. Furthermore, at the time this order was entered, the Court had before it nothing on behalf of the plaintiff, the defendant or CIG. Therefore, El Paso

[2] It is further evidence of the unusual and limited nature of that hearing that both the appellant and all the appellees shared time for argument on the same side.

assumed that the hearing was intended to give the actual parties to the litigation an opportunity to answer the charges leveled by the outsiders. Moreover, it would have been impossible for any party to have briefed — in the four days allowed[3] — the questions the majority later decided. The record of the proceedings below filed in this Court was not even complete, let alone in a manageable form.[4] Most important, it was this Court that directed that a new judge be selected to make "meticulous findings" in accordance with the guidelines it set forth in *Cascade*. It did not seem likely that this Court would disavow the considerable work undertaken at its direction without so much as holding a hearing for that purpose, or at the very least, giving adequate opportunity for briefing the question.

It was only reasonable to suppose, then, that this unique proceeding would be followed by a full-scale hearing on the merits if the Court were pursuaded that Utah's motion to withdraw its appeal should be denied or that Mr. Bennett's motion for a hearing should be granted. In any case, neither El Paso nor any other party in fact briefed or argued the

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[3] All parties who inquired were advised by the Office of the Clerk of this Court to have their briefs on file by Friday, April 25, 1969.

[4] One of the most important sets of documents involved, the so-called "Implementing Documents," was inexplicably not transmitted to this Court as part of the record below. These documents include the agreement setting forth the terms of the sale of New Company to CIG, including the ratio for conversion of New Company Preferred stock into CIG common, the agreement governing the operation of New Company pending final divestiture, the cancellation of the Sumas Exchange Agreement, the San Juan Basin Gathering Agreement, and the provisions isolating El Paso from any exercise of control over New Company and CIG. The absence of these documents is undoubtedly responsible for the majority's comment: "What the conversion ratio will be is not known; but, it is said, there will be provisions to restrict El Paso control over the New Company."

questions the Court decided.[5] And certain it is that the Court gave no indication that it intended to decide the entire case on the basis of this hearing. It nevertheless did so, without having heard argument or read briefs on the merits, and on the basis of an incomplete record. In so doing this Court violated its own rules.

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[5] A review of the oral argument clearly demonstrates the extremely limited nature of the proceedings, as understood by the parties. Thus, Mr. Romney, attorney for Utah, addressed himself entirely to the reasons why Utah decided to dismiss its appeal. He never even touched on the merits. Mr. Payne, on behalf of El Paso, stated precisely what he thought the issue was at the outset of his argument: "As I understand the questions which are before the court for discussion this morning, they relate to two questions. One, should the motion of Utah to dismiss the case be granted or denied, and secondly, should Mr. Bennett's motion for another hearing in the case be granted or denied." Oral Argument at 6. His understanding that any further decision on the merits would require additional proceedings is demonstrated by his comment that "The question then really should turn on whether this is the kind of case in which the court should reach down into the District Court proceedings and bring them up and reopen them." Oral Argument at 7. He concluded: "I strongly urge this court not to reopen these proceedings." Oral Argument at 11. Mr. Hooper on behalf of Cascade and seven other parties devoted virtually his entire argument to the fact that the District Court had selected the most viable available entity capable of serving the area and the one most likely to compete against the pipeline companies presently serving California. The two sentences from his argument quoted by the Court in footnote 2 of its opinion, when read in the context of the entire argument, clearly show Mr. Hooper's assumption that further proceedings necessarily would be involved if the Court denied Utah's motion to dismiss. Mr. Sonnett, on behalf of Colorado Interstate, devoted all of his argument to the single point that his client had never been a potential competitor in the California market. Mr. Skjeie, for the State of California, urged the Court to grant Utah's motion to dismiss, said that the Court should act quickly in view of the situation in that state, and set forth California's reasons for dismissing its own appeal. And finally, the Solicitor General recited step by step how he reached the decision on behalf of the United States not to appeal the District Court's selection of CIG as the successful applicant. At no point in his argument did he give the slightest hint that he thought that the division of assets or the mechanics of divestiture were in question.

This Court's Rule 16 provides that the appellee may file a motion to affirm. A motion to affirm is not a mere formality. On the contrary, as this Court held in *Bohanon* v. *Nebraska,* 118 U. S. 231, 233 (1886): "Upon a motion to dismiss we cannot consider the merits of the question on which our jurisdiction depends, and no motion has been made to affirm." It is inherent in the nature of a hearing on a motion to dismiss that a determination on the merits may not be made, and that principle is well settled in this Court. *E.g., Minor* v. *Tillotson,* 42 U. S. 287, 288 (1843); *Hecker* v. *Fowler,* 66 U. S. 95, 96 (1862); *Sparrow* v. *Strong,* 70 U. S. 97, 105 (1866); Ex parte *McCardle,* 73 U. S. 318, 327 (1868).

El Paso's motion to affirm in this case would have been a vehicle for allowing it to argue the merits sufficiently so that the Court could, if it chose, make summary disposition of the case. The Court's refusal to dismiss Utah's appeal coupled with its rejection of El Paso's right to be heard — either through a motion to affirm or through other briefs and argument on the merits — denied El Paso the hearing to which it is clearly entitled under the Supreme Court's own rules.

In determining simultaneously that the appeal should be heard and that the District Court should be reversed, without affording any opportunity for the parties to be heard on the underlying merits, the Court also violated basic principles it has laid down in other cases. *E.g., Garrison* v. *Patterson,* 391 U. S. 464 (1968); *Carafas* v. *LaVallee,* 391 U.S. 234 (1968); *Nowakowski* v. *Maroney,* 386 U.S. 542 (1967). In *Garrison* this Court held that a federal Court of Appeals could not hold a hearing on whether probable cause for appeal exists, determine that it does, and at the same time affirm the lower court's judgment

without giving the party adversely affected an opportunity to argue the merits of the appeal. This Court by a *per curium* opinion said:

> The principle underlying that decision [*Nowakowski* v. *Maroney, supra*] was that if an appellant persuades an appropriate tribunal that probable cause for an appeal exists, he must then be afforded an opportunity to address the underlying merits. This principle is no less applicable when a court of appeals, having received submissions relating only to probable cause and other procedural matters, decides that probable cause indeed exists. [391 U. S. at 466.]

The holding in *Garrison* does not require a court of appeals to receive briefs, hear oral argument, or hold separate hearings on the issues whether an appeal should be heard and whether the merits of the case warrant reversal. What *is* required, however, is that the parties be given fair notice and an adequate opportunity to argue the merits if such summary procedures are to be employed. "[T]he appellant must be afforded *adequate opportunity* to address the merits, and . . . if a summary procedure is adopted the appellant must be informed, by rule or otherwise, that his opportunity will or may be limited." 391 U.S. at 466 [Emphasis added.].

The substantive content of this instruction is made clear, at least for the purposes of the present case, by the facts set out in footnote 2 of the Court's opinion in *Garrison*. The question had arisen whether the merits had in fact been addressed at the one hearing the Court of Appeals held. It appeared that the merits had been discussed at that hearing to the extent necessary to show grounds for accepting the appeal, and that the petitioner had been given all the time for argument he wanted. It was considered decisive, how-

ever, that no rule or decision had been available which, if consulted, would have forewarned petitioner that a decision on the merits would be forthcoming from the procedural hearing. There was not only no such formal forewarning in the case at bar, there was no basis upon which counsel could have foreseen their peril.

Therefore, this Court held in *Garrison* v. *Patterson* that a federal appellate tribunal may not decide the merits of a case on the basis of a hearing disguised as a hearing to determine whether the merits should be heard at all. As this Court said there, the party adversely affected must be given an "adequate opportunity" to be heard. The order setting the hearing this Court held on April 29 gave no hint that it was to be a hearing on the merits. Within the meaning of *Garrison* v. *Patterson*, then, El Paso was not afforded an adequate opportunity to be heard.[6]

The principle of *Garrison* v. *Patterson* is plainly a principle of elementary fairness that ought to apply to all appellate proceedings.

II. THIS COURT'S RULINGS WERE BASED ON A MISUNDERSTANDING OF THE RECORD

There is another reason why this Court should not abridge its procedures in complex cases of this kind, of

[6] This is not to argue that this Court cannot decide issues not briefed or argued to it in antitrust cases *after a hearing on the merits. Continental Ins. Co.* v. *United States,* 259 U. S. 156 (1922); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U. S. 129 (1967). In that situation, the appellees are on notice that any aspect of the decision appealed from may be at issue, and the hearing on the merits affords them adequate opportunity to give such support to the decision as they feel necessary. Even where the Court affirms or reverses a trial court without argument in Expediting Act cases, it has before it both the appellant's Jurisdictional Statement and the appellee's Motion to Affirm or to Dismiss.

equal rank with the question of fairness to the litigants. By depriving itself of the opportunity to hear argument and to read briefs on the merits of a difficult case, any Court inevitably opens the way for misunderstandings of the record. It is submitted that this Court's rulings in this case are based on erroneous conclusions of fact which in turn are traceable to the summary approach it employed. In at least one respect, the Court entered a ruling which is wholly inconsistent with its own mandate.

The following are examples of issues which would have been fully explored had the parties had the opportunity to do so. Because of a lack of such opportunity, this Court fell into what El Paso respectfully submits was substantial error.

1. A "reallocation" of San Juan Basin gas reserves is not *feasible, and is not necessary to accomplish the objectives* of Cascade.

Three considerations, based on facts established below, make the Court's intentions regarding the disposition of gas reserves on remand unclear. This Court stated that there must be a "reallocation" of gas reserves, particularly of those in the San Juan Basin, in order "to place the New Company in the same relative position vis-a-vis El Paso in the California market as that which Pacific Northwest enjoyed immediately prior to the illegal merger."

First, the District Court followed carefully this Court's instructions in *Cascade* that the New Company must be given gas reserves "no less in relation to present existing reserves than Pacific Northwest had when it was independent," and that "the new gas reserves developed since the merger must be equitably divided between El Paso and the New Company." The District Court in fact ordered El Paso to divest a greater percentage of reserves to New

Company than Pacific Northwest [PNW] had before the merger, including all the reserves that PNW brought into the merger. The divestiture ordered by the Court below gave New Company *over fifty percent* of the reserves the combined companies had developed since the merger.[7]

Second, it was established below that the San Juan Basin cannot physically support another pipeline to California. See T. 751-52, 756, 2383, 2669, 3486.[7] There simply are no gas reserves in the San Juan Basin available for that purpose. All of the San Juan reserves are already flowing to certificated markets. All other gas reserves in proximity to New Company's pipeline were ordered divested to New Company.

This, then, is the meaning of the District Court's finding that El Paso's total system reserves cannot support the needs of El Paso's and New Compay's existing customers, and at the same time provide enough gas to New Company to support a new project to California. *United States* v. *El Paso Natural Gas Company*, 291 F. Supp. 3, 20 (D. Utah 1968). The gas is not there. As the Court also found, "for New Company and El Paso to be competitors for future increments to the California market will require that *both* seek new reserves." 291 F. Supp. at 20 [Emphasis added.].

Third, it was established below that 400,000,000 cubic feet per day of new and otherwise uncommitted Canadian gas reserves are available to the New Company, over and above the reserves ordered to be divested by the Court below. This gas did not figure in the calculation leading to the conclusion that New Company's total system reserves are not suffcient to meet "the requirements of the New Company to serve the northwest division and to supply a project by which New Company would compete in the California market . . . 291 F. Supp. at 21-22. It will be re-

[7] All testimony references are to the Transcript.

membered that it was with Canadian reserves that PNW mounted its only challenge to El Paso's position as the sole out-of-state supplier of gas to California. *United States* v. *El Paso Natural Gas Company*, 376 U. S. 651, 654 (1964). PNW never had enough San Juan Basin reserves to support a project to California. Instead PNW had a letter agreement from Westcoast Transmission Company whereby Westcoast agreed to make 250,000,000 cubic feet per day available to PNW, out of unspecified Canadian reserves, subject to further agreement on all terms and conditions of the sale. El Paso Exhibit 45. This was the gas PNW attempted to take to California. *United States* v. *El Paso Natural Gas Co., supra* at 654. To restore New Company to PNW's competitive position vis-a-vis California, a similar commitment was obtained from Westcoast that 400,000,000 cubic feet per day of Canadian reserves would be available to New Company. El Paso Exhibit 46. These Canadian gas reserves are available to New Company on the same basis as PNW's Canadian reserves were available to it, and exceed the Canadian reserves committed to PNW by sixty percent. The practical feasibility of using these Canadian reserves to support a California project by New Company is attested to by CIG's announced plans to do so.[8] The lower Court's decree, then, restored PNW's competitive potential to New Company in kind, but in greater degree.

On the facts established below, the "reallocation" the Court directs is not only not feasible but is not necessary "to place New Company in the same relative competitive

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[8] Oral Argument at 60. Since the hearing, plans for an enormous project to bring over a billion cubic feet a day to the U. S.-Canadian border have been announced. The principals in that project envision that part of this gas will form a gas supply for New Company to carry to California. *Wall Street Journal*, June 24, 1969.

position . . ." as PNW. To put it another way, any reallocation undertaken by the Court below pursuant to this Court's new mandate could only arrive at the same general result. It is respectfully submitted that this Court's ruling on gas reserves must therefore have been based on insufficient information.[9]

2. The method of divestiture decreed below conforms to the method of divestiture decreed in United States v. E. I. du Pont de Nemours & Co.

Against the factual background of this case, the Court's reliance on *United States* v. *E. I. du Pont de Nemours & Company,* 366 U. S. 316 (1961) to strike down the method of divestiture adopted below is clearly misplaced.[10] Although it was not evident to the Court upon this incomplete presentation, the divestiture plan at bar is in complete

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[9] It might be helpful in passing to correct other factual misstatements found in this portion of the majority opinion. The District Court found that the passage of time had indeed made entry into the California market more difficult, and found that divestiture to any applicant other than CIG would benefit El Paso by weakening the competition of the New Company. The District Court did *not* find that the delay in resolving this case had strengthened El Paso's hold on the California market since 1957. In fact El Paso's "hold on the California market" has deteriorated since it acquired Pacific Northwest, as evidenced by the fact that *two* additional out-of-state suppliers have entered the California market, not one as this Court stated. Since 1957, El Paso has supplied less than one-third of the load growth of the California market. El Paso Exhibit 110.

[10] The Court's insistence on a cash sale begins with the statement that no party argued that the Court below *did* order complete divestiture. The reason for this oversight is not difficult to find; no one realized that question was in issue. Surely it does not follow that everyone conceded that the Court below did *not* order complete divestiture. Certainly, El Paso did not intend to concede the point. And *no one* argued that "the disposition made by the District Court was the best that might be made without complete divestiture."

accord with *du Pont*. As the Court points out, the issue in *du Pont* was whether du Pont should be required to transfer all attributes of ownership of the 63,000,000 shares of General Motors stock it held to its stockholders or only the voting rights represented by those shares. It is true that this Court there required "complete divestiture," but the "complete divestiture" it is talking about allowed du Pont to divest its General Motors stock to its own shareholders. The divestiture before the Court now does the same thing, but with the addition of significant restrictions making it impossible for anyone to exert any influence on the management of both companies at the same time.[11] Furthermore, du Pont passed down to its shareholders voting common stock, whereas El Paso would pass down non-voting preferred stock, convertible after five years into *CIG* common, not New Company common. Neither El Paso nor its shareholders could ever have a direct voice in the affairs of the New Company. Thus, the majority states that "only a cash sale will satisfy the rudiments of complete divestiture" on the authority of a case that held that a divestiture plan less stringent than El Paso's constituted complete divestiture!

The Court's treatment of this problem suggests it was under a misapprehension about the facts in that it apparently believed that El Paso itself would retain a stock interest in the New Company. In fact, El Paso, as the transferor of the properties to be divested, would be the party to whom the New Company Preferred would initially be delivered. But the plan of divestiture envisioned that the New Company Preferred Stock would in short order

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[11] The "Restrictive Provisions" formulated to accomplish this result are not before this Court and are too detailed to be summarized adequately; therefore, they have been included in their entirety as an Appendix to this Petition.

be passed down to El Paso's shareholder's, just as was done in *du Pont*.[12] El Paso would thus function solely as a conduit for the transfer of that stock to its 131,000 stockholders. For purposes of comparison, the "complete divestiture" in *du Pont* gave du Pont ten years to divest itself of all its General Motors stock.

If, as the Court has now said, "the same reasoning is applicable to the present case", then "retention by El Paso and its stockholders of the preferred stock" is no less a complete divestiture than was the retention by du Pont's stockholders of General Motors voting common stock.

3. The debt structures of El Paso and New Company were to be completely separate.

The majority opinion precludes the New Company from agreeing with the holders of the bonds and debentures currently secured by the properties to be divested, to substitute its own bonds and debentures for those of El Paso at substantially the same low interest rate. An incomplete presentation again led the Court into error; it was never intended that New Company would "assume" El Paso's debt in the sense the Court apparently understood. New Company would not pay interest to El Paso nor would it be liable to El Paso for a default on its debt. Neither would El Paso be in any way liable on New Company's debt. The plan was for El Paso to be released from so much of El Paso's indebtedness as was attributable to the properties to be divested, simultaneously with the issuance by New Company of its own bonds and debentures in like amount which would be secured by the property to be divested

[12] Revenue Ruling issued to El Paso on Oct. 23, 1968, filed with District Court and served on all parties by El Paso by letter of Oct. 30, 1968. The Ruling would allow El Paso to sell outright up to twenty percent of the New Company Preferred.

under New Company's mortgage. The debt was thus to be proportionately divided and completely severed. Simply stated, the end result of the transaction ordered by the District Court would have been two separate debt structures secured by different properties.

It cannot be forgotten that *Continental Insurance Company* v. *United States, supra,* the procedural precursor of the Court's decision here, was also the principal case governing the handling of debt obligations in antitrust divestiture cases. In that case, the defendant Reading Company created a new coal company to which it divested its illegally held coal producing properties, but itself took a mortgage from the new coal company secured by the divested properties and remained liable to the bondholders on the whole of the debt of the combined companies. In short, the new coal company was liable on its debt to the defendant and the defendant, in turn, was liable to the financial institutions. The Court held that this arrangement bound the companies together because it created an incentive on the part of the debtor coal company to favor the creditor railroad company with its shipping and prompted a "community of operation" between the two to avoid default under mortgage. Therefore, the Court ordered that the indebtedness of the combined companies be proportionately divided and split up, in precisely the way El Paso and New Company proposed to do here. As this Court said then, "By this arrangement the interest and joint obligations of the Reading Company and the Coal Company will be completely severed, and the purpose of this court carried out." 259 U.S. at 173.

This Court's conclusion that "assumption of $170,000,000 of El Paso's indebtedness helps keep the two companies in league" is thus incomprehensible in light of the *Continental Insurance* case unless one assumes the Court was laboring

under a misconception of the facts. The only conceivable connection between the two companies under the lower Court's decree would be that the 130-odd institutions that hold El Paso's debt would also hold New Company's debt; one or more of these same institutions, of course, also own bonds and debentures of every gas transmission company in the United States.

Aside from the fact that this holding is not based on accurate information, it is disastrous from the point of view of the Court's own objectives. The average weighted interest cost on the debt the New Company would have obtained under the District Court's decree was 5.26 percent, because El Paso would in effect have been divesting to New Company its proportionate share of the low-cost debt of the combined companies, most of which was issued when interest rates were below five percent. Interest rates on recent comparable issues are approaching nine percent. If New Company is not allowed to share in this low-cost debt, it will have to fund its operations at present market,[13] and incur an interest cost on the $170,000,000 at least three percent higher. This will result in additional costs to the New Company in the range of $5,000,000 annually, most of which will presumably be covered by immediate rate increases to the gas consumers in the Northwest. This rate increase will make the New Company immediately less competitive with the alternate fuel supply sources that proliferate in the Northwest. The high cost of its debt will, of course, also be reflected in the costs of any California project the New Company might propose and would put it

[13] Utility regulatory commissions require that a high proportion of a public utility's total capitalization be represented by debt, because debt is "cheaper" than equity and thus results in lower rates to the consumer. *American Telephone & Telegraph Co.*, 70 P.U.R. 3d 129 (1967); *Panhandle Eastern Pipe Line Co.*, 40 F.P.C. 98 (1968).

at a serious competitive disadvantage in attempting to serve that market.

In no sense, then, can the "assumption" of $170,000,000 of debt at three to four percent below current market be considered as some sort of onerous burden El Paso succeeded in foisting off on the New Company. This low cost funding arrangement was regarded by all as one of the most attractive features of the plan of divestiture ordered by the Court below.[14] Indeed, every Applicant for Acquisition below viewed the debt "roll-over," as it was called, as critical to the economic viability of the New Company and as an indispensable prerequisite of their respective plans for acquisition. See, *e.g.,* T. 4254.

No one of the thirty-four participants below saw any anti-competitive potential lurking in the *Continental Insurance* roll-over arrangement adopted by the Court below, or anywhere at anytime even hinted that what the Court has now done might be appropriate. This Court's decision to alter radically the one absolutely uncontroversial feature of this divestiture will succeed only in saddling the New Company with a competitive disadvantage and the gas consumers of the Northwest with a huge financial burden.

III. CONCLUSION

We respectfully suggest that all of the factual misunderstandings and oversights could have been avoided if the parties had been given an opportunity to brief and argue the merits of this case. Instead, by proceeding as it did, the

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[14] As the financial witness for one applicant observed, "I would like to have, quite frankly, as much of that 5.26 money as I could get . . ." T. 6745.

Court not only violated El Paso's right to a hearing but ruled in a fashion that will defeat the very rights it was attempting to protect.

This case is far too important, not just to the immediate parties, but to the consumers in a large area of our country, to be decided in such a short time, after an inadequate presentation, and on the basis of a misunderstanding of some of the most basic and relevant facts upon which the result must hinge. Only a rehearing will assure that these consumers are accorded the advantages and protection which the Court intended to bestow. We urge that rehearing be granted so that a hearing on the merits may be held.

Respectfully submitted,

El Paso Natural Gas Company

By ....

Leon M. Payne

Counsel of Record

CERTIFICATE OF GOOD FAITH

I, Leon M. Payne, Counsel of Record for Petitioner El Paso Natural Gas Company, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

....
Leon M. Payne
Counsel of Record
El Paso Natural Gas Company

July 10, 1969

APPENDIX

RESTRICTIVE PROVISIONS

El Paso and Colorado Interstate have agreed, subject to the approval of the Court, that the following restrictive provisions should be included in the Court's Final Order in this cause.

1. Definitions

a. The term "El Paso" shall mean El Paso Natural Gas Company, a Delaware corporation, or any successor.

b. The term "El Paso Affiliate" shall mean any Person directly or indirectly controlling, controlled by, or under common control with El Paso.

c. The term "Immediate Family" shall mean with reference to any individual person, the spouse, descendants, ascendants, brothers and sisters of such person.

d. The term "Person" shall mean any individual, partnership, association, joint-stock company, business trust, or organized group of persons, or other legal or business entity whether incorporated or not; or any receiver, trustee or other liquidating agent of any of the foregoing in his capacity as such.

e. The term "Holder of Record Only" shall mean, with reference to shares of stock of any corporation, any person who holds such shares solely of record as broker, pledgee, trustee, agent or otherwise in a representative capacity which carries no beneficial interest in such shares.

f. The term "Northwest" shall mean Northwest Pipeline Corporation, a Delaware corporation, or any successor.

g. The term "Northwest Preferred Stock" shall mean the preferred stock of Northwest to be issued to El Paso in exchange (in part) for the assets to be divested by El

Paso pursuant to the plan of divestiture ordered by the Court.

h. The term "Original Issue Date" shall mean the date on which the shares of the Northwest Preferred Stock shall first be issued.

i. The term "Colorado Interstate" shall mean Colorado Interstate Corporation (formerly Colorado Interstate Gas Company), a Delaware corporation, or any successor.

2. Restrictions Against Exchange of Northwest Preferred Stock

a. Neither El Paso nor any El Paso Affiliate may exchange any Northwest Preferred Stock for Colorado Interstate Common Stock.

b. The Northwest Preferred Stock may be redeemed (at the option of the holder thereof) by Northwest for Colorado Interstate Common Stock only upon presentation to Northwest or its agent of a certification by the holder thereof (or, in the event such holder is a Holder of Record Only, a certification by the beneficial owner thereof) to the effect that such holder (or beneficial owner):

(i) is not an officer or director of El Paso or of an El Paso Affiliate;

(ii) does not beneficially own, control or hold with power to vote, directly or indirectly, in excess of one-half of one per cent (½ of 1%) of the then issued and outstanding shares of the common stock of El Paso;

(iii) is not a member of the Immediate Family of any officer or director of El Paso or, to the best of the information, knowledge and belief of such holder, of any person who beneficially owns, controls or holds with the power to vote, either directly or indirectly,

in excess of one-half of one per cent (½ of 1%) of the then issued and outstanding common stock of El Paso;

(iv) is not acting for, or on behalf of any Person hereby precluded from redeeming Northwest Preferred Stock; and

(v) is not acting in concert, agreement or understanding with any other Person, but is acting in good faith solely in such holder's (or in such beneficial owner's) own behalf.

3. Restrictions Against Acquisition of Northwest Common Stock and Colorado Interstate Common Stock

No person who is an officer or director of El Paso or of an El Paso Affiliate, shall be permitted to purchase or retain any of the common stock of Northwest or to purchase or retain more than one-tenth of one per cent (0.1%) of the then outstanding common stock of Colorado Interstate; nor for a period of ten years from the Original Issue Date shall any Person who, in the aggregate with members of his Immediate Family and with any Person with whom he is acting in concert, agreement or understanding and with any Person for whom or or whose behalf he is acting, beneficially owns, controls or holds with power to vote, either directly or indirectly, in excess of one-half of one per cent (½ of 1%) of the then outstanding common stock of El Paso, be permitted to purchase or retain any of the common stock of Northwest nor to purchase or retain more than five per cent (5%) of the then outstanding common stock of Colorado Interstate. The Attorney General of the United States shall have access to the stock transfer of books and records of El Paso, Northwest and Colorado Interstate for the purpose of enabling him to enforce compliance with this provision. Nothing herein contained shall

extend to any Holder of Record Only of stock of El Paso, Northwest or Colorado Interstate.

4. Further Restrictions

a. Except as contemplated in the plan of divestiture ordered by the Court, El Paso and its Affiliates are hereby enjoined from acquiring any capital stock or financial interest whatsoever in Colorado Interstate or in Northwest or any assets of either, except such assets as might pass between El Paso and Colorado Interstate or between El Paso and Northwest in the ordinary course of their respective businesses.

b. For a period of ten years from the Original Issue Date, and except as contemplated by the plan of divestiture ordered by the Court, El Paso shall not acquire or hold after such acquisition, directly or indirectly, any of the outstanding common stock of Westcoast Transmission Company, Limited or any of the outstanding common stock of Northwest Production Corporation.

c. El Paso shall not have any person as an officer or director who is at the same time:

(i) an officer, director or employee of Northwest or Colorado Interstate;

(ii) the owner of any common stock of Northwest or more than one-tenth of one per cent (0.1%) of the outstanding common stock of Colorado Interstate or a person all members of the Immediate Family of which own in the aggregate more than one-tenth of one per cent (0.1%) of the common stock of Northwest or more than two-tenths of one per cent (0.2%) of the common stock of Colorado Interstate.

d. El Paso shall not employ, during a period of five (5) years from the Original Issue Date, any employee of Northwest without first obtaining the consent in writing of Northwest.

e. El Paso, its Affiliates, officers and directors are hereby enjoined from exercising the voting rights accorded the holders of the Northwest Preferred Stock as set forth in subparagraph (b) of paragraph 5 of the Certificate of Amendment of the Certificate of Incorporation of Northwest attached as exhibit .... to the Agreement dated ...., 1968, between El Paso, Colorado Interstate and Northwest on file in this cause, should such voting rights arise while such stock is held by them.

IN THE

Supreme Court of the United States

October Term, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION,
Appellant,

v.

EL PASO NATURAL GAS COMPANY, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

JOINT PETITION FOR REHEARING OF APPELLEES, IDAHO PUBLIC UTILITIES COMMISSION, PUBLIC UTILITY COMMISSIONER OF OREGON, AND WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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SUBJECT INDEX

IN THE

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JOINT PETITION FOR REHEARING OF APPELLEES, IDAHO PUBLIC UTILITIES COMMISSION, PUBLIC UTILITY COMMISSIONER OF OREGON, AND WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PETITION FOR REHEARING

Petitioners Idaho Public Utilities Commission, Public Utility Commissioner of Oregon and Washington Utilities and Transportation Commission, under the provisions of Rule 58 of this Court, pray that this Court grant rehearing of its order of June 16, 1969, vacating the judgment of the District Court and remanding the cause for proceedings in conformity with its opinion.

Petitioners are the regulatory agencies of Idaho, Oregon and Washington and as such are charged with the duty of representing the public interest in all proceedings affecting rates, charges and services to consumers of regulated public utilities doing business in those states.

REASONS FOR GRANTING REHEARING

I. Participation of Idaho, Oregon, and Washington Commissions in Proceedings

In view of the procedure followed by this Court in arriving at its decision of June 16, 1969, petitioners herein have not been afforded the opportunity to present to this Court through brief and oral argument their positions relative to the final decree of the District Court. Petitioners did file with this Court a Joint Motion To Affirm *Or In The Alternative To Dismiss* and a supporting brief in answer to the Jurisdictional Statement filed on behalf of the Utah Public Service Commission. Petitioners were also represented at the oral argument regarding the motion of appellant to dismiss its appeal under Rule 60. At no time, however, have petitioners been granted the opportunity to present to this Court their views relative to either the merits of this case or whether this Court's mandate has been followed in a satisfactory way.

II. Interest of Idaho, Oregon, and Washington Commissions in Proceedings

Petitioners as regulatory commissions within their respective states are motivated by a concern for public not private interests. It is in the protection of the public interest that petitioners respectfully bring to the attention of this Court the injurious consequences to the consum-

ers of natural gas if its mandate of June 16, 1969, is allowed to stand.

The company to be created in this proceeding will be a public utility and will be the only gas pipeline supplier certificated by the Federal Power Commission to serve the Pacific Northwest. The gas consumer must look to this pipeline supplier as the ultimate source of natural gas. If gas costs increase, or the supplier is unable to meet its financial commitments, the gas consumer in the Pacific Northwest cannot turn to another supplier for there is no other. The public interest is not being served if out of this divestiture increased gas costs are incurred by the consumers of the Pacific Northwest. It is an unavoidable economic consequence that as the cost of gas increases, the increase is inevitably reflected in the price the consumer must pay, either by foregoing rate reductions or in rate increases.

III. Result of Requirement That Divested Assets Be Sold for Cash

The requirement of a cash sale of the assets inflicts upon consumers the harshest of consequences. This Court's order of June 16, 1969, directing that only a cash sale of the assets will satisfy the rudiments of complete divestiture, actually has the effect of perpetuating the harm to consumers that this lawsuit was intended to correct. It forces upon the consumer the expense of supporting an inflated capitalization and harnesses New Company with a financial structure that will impede its ability to expand its present markets. The New Company would be placed in the position of being at a grievous competitive disadvantage insofar as the California market

is concerned. The effect of this Court's mandate, requiring a cash sale of the assets, is to saddle New Company with a capitalization garnered from a financial market which is presently demanding the highest interest rates that this country has experienced in over a century.

The record in this case reveals that on December 31, 1967, New Company would have a proposed capitalization of $231,553,000. Of this amount, the total long-term debt, including maturities, was $170,542,000, and common equity was $61,011,000 (El Paso Ex. 1, Tab 17). It is recognized that since this date, new capital improvements have been added to the system and a certain amount of debt has been retired but these figures will suffice for illustrative purposes. The capitalization of approximately $231,000,000 also reflects the book value of New Company properties which is the original cost less depreciation.

Testimony in this record indicates that the bondholders of El Paso had agreed to become the bondholders of New Company and would "roll over" the debt to New Company for a premium of ⅛th of 1 percent, which would result in New Company having an embedded debt cost of approximately 5.26 percent. As a result of this Court's mandate, that debt with its low embedded cost will disappear and equivalent debt money from today's market will be obtained. In essence, New Company is forced to trade debt at a cost of 5.26 percent for equivalent debt at a current market cost which could well be in excess of 8.5 percent or 9 percent. In view of the fact that interest paid on debt is a component embodied in computing a required rate of return for a regulated utility, it is neither

El Paso nor New Company which will pay the additional cost of debt on $170,000,000, but the ultimate consumer of natural gas will be the individual from whose pocket this additional cost will be paid. A prohibition of the debt roll over would provide a windfall to present bondholders at the expense of present ratepayers, and nothing more.

This Court states that: "(a)ssumption of $170,000,000 of El Paso's indebtedness helps keep the two companies in league" (slip opinion, p. 7). Use of the word "assumption" implies that El Paso would be liable should the New Company default on the indebtedness assumed. There was no assumption in that sense. New bonds were to be issued to the same lenders. El Paso would thereafter have had no obligation whatsoever in connection with them.

It should be pointed out that the retirement of El Paso debt and the debt of New Company is a continuous operation which tends to dissipate the common identity of the bondholders of the two corporations. As new issues of debt securities are issued by El Paso and New Company, further dissolution of the common identity would occur.

IV. Effect of Requirement That Assets Be Sold for Cash

New Company's books must reflect the price paid for the properties. Under a cash sale, if $231,000,000 were paid as of December 31, 1967, then the book value of the properties and the cash sale would be the same. However, it is expected that in today's market, book value and market value of these properties would not be identical. This Court's mandate requiring a cash sale will result in

New Company reflecting on its books all consideration paid in excess of book value (known as an "acquisition adjustment" for rate making purposes) and this would create an immediate deterrent to its viability and credit position.

The very nature of the cash sale is what creates the acquisition adjustment problem, culminating in a direct detriment to both present and potential consumers of natural gas of New Company. If the excess is included in the rate base, then the consumer must pay rates derived from this inflated base. If it is not included in the rate base, there will be a substantial dilution of the equity which will impair New Company's ability to attract new capital.

It is the combination of this Court's disallowance of the roll over of the debt and the Court's requirement for a cash sale that so drastically increases New Company's cost of service and visits upon consumers the substantially higher rates.

V. New Company Created by this Court's Mandate Will Be in a Weaker Position Than Was Pacific Northwest Pipeline

Since New Company will be a regulated utility, the Federal Power Commission will make a determination as to its rate of return. To date the rate of return allowed regulated utilities by the Federal Power Commission has been in the neighborhood of 7 percent. However, under this Court's mandate, the entire debt interest cost alone will be substantially above that level. New Company is entitled to recover in dollars an amount sufficient to cover that interest cost, plus a reasonable return on book

equity under present rate making principles. New Company's compliance with these standards will result in a substantial increase in rates to existing customers, all of which is caused by nothing more than a change in ownership. New Company is placed in a position of attempting to compete in the California market against existing pipeline competitors who are operating at a cost substantially below that of New Company, which is to be required to finance its entire operation with cash in the present financial market. The end result is that New Company, under this Court's mandate, will have higher debt and equity costs and will not be placed in the same competitive position as was Pacific Northwest Pipeline Corporation at the time of the illegal acquisition. The method of divestiture adopted by the District Court, that being a plan other than a cash sale, avoided the harmful effects discussed above.

CONCLUSION

The basic premise underlying this Court's decision is that the public interest dictates that this case must be remanded for further proceedings. Had the Court allowed the parties to file full briefs and present oral argument, the state regulatory agencies would have demonstrated that the District Court decision would better serve the public interest than would the decision of this Court. Yet, the state regulatory commissions of Idaho, Oregon, and Washington, with the prime duty to represent the consumer interest, have not been permitted adequately to represent the interests of the consumers of natural gas in the Pacific Northwest. If permitted to do so the regulatory agencies would have or will show that the unavoid-

able result of this Court's decision is higher gas costs to the consumer in the Northwest and a removal of any possibility that the divested company will be a competitor in *any* market.

Petitioners have not been heard on these issues and have not had an opportunity to submit briefs on them. Petitioners were parties below, and they should be afforded the right at least to submit briefs, it not to argue, for anything else fails to accord due process to them and the citizens of the states of Idaho, Oregon, and Washington.

For the reasons set forth above, it is respectfully urged that rehearing be granted.

Respectfully submitted,

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Assistant Attorney General, for
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SLADE GORTON
Attorney General, for
Washington Utilities and
Transportation Commission.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

____
Counsel of Record for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION, *Appellant,*

v.

EL PASO NATURAL GAS COMPANY, ET AL., *Appellees.*

On Appeal From the United States District Court for the District of Utah

PETITION OF ARIZONA APPELLEES FOR REHEARING OR, ALTERNATIVELY, MODIFICATION OF JUDGMENT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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No. 776

Utah Public Service Commission, *Appellant*,

v.

El Paso Natural Gas Company, et al., *Appellees*.

On Appeal From the United States District Court for the District of Utah

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PETITION OF ARIZONA APPELLEES FOR REHEARING OR, ALTERNATIVELY, MODIFICATION OF JUDGMENT

Undersigned appellees, herein collectively referred to as Arizona Appellees, respectfully petition for rehearing or, alternatively, for modification of the Court's judgment issued herein on June 16, 1969 as more particularly specified below.

I.

ADVERSE JUDGMENT ISSUED WITHOUT NOTICE OR HEARING

The State of Arizona appears here on behalf of The Arizona Corporation Commission, a government body established by law and regulating, *inter alia,* the distribution of natural gas service by public utilities in the State of Arizona.

Arizona Public Service Company and Tucson Gas & Electric Company are public utilities operating solely within the State of Arizona under regulation of The Arizona Corporation Commission. Each obtains all of its natural gas supplies from El Paso Natural Gas Company (El Paso). Each will remain a customer of El Paso after divestiture takes place.

None of the Arizona Appellees was a party to the unlawful merger which is the subject of this proceeding.

Arizona Appellees qualified as intervenors as of right in the proceedings below under *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129 (1967). They intervened, became parties and participated actively in every phase of the protracted proceedings before District Judge Hatfield Chilson. Their interest in the divestiture which the Court has ordered stems from the fact that El Paso is a "natural-gas company" regulated by the Federal Power Commission under the Natural Gas Act. El Paso's rates for natural gas service are designed to earn its cost of service. When El Paso's cost of service rises, the Company is entitled to file for and collect offsetting higher rates. See *United Gas Co.* v. *Memphis Gas Div.,* 358 U.S. 103 (1958), *rehearing den.* 358 U.S. 942 (1959); *El Paso*

Natural Gas Co. v. *Federal Power Commission*, 281 F. 2d 567 (5th Cir. 1960), *cert. den.* 366 U.S. 912 (1961), *rehearing den.* 366 U.S. 955 (1961).

Certain of the divestiture proposals presented to Judge Chilson might have punished El Paso, but they most certainly would have increased El Paso's cost of service and thereby penalized innocent gas consumers through higher gas costs. Arizona Appellees vigorously opposed such proposals. The relevant facts were developed on the record and Arizona Appellees argued to the District Court that such injury to consumers in Arizona was unjust, unequitable and unnecessary.

Among the propositions opposed by Arizona Appellees in this manner were a demand for the allocation of substantial additional volumes of natural gas to New Company and a proposal calling for the cash sale by El Paso of its equity interest in the divested properties.

The decree of Judge Chilson did not unduly injure Arizona Appellees or the consumers they protect and serve. The District Court did not sanction a cash sale. The Court allocated more gas reserves to New Company than Arizona Appellees believed required by *Cascade* or by basic principles of equity; but the need for restoring certainty and stability to the natural gas public utility business in the western states through an early end to this litigation seemed sufficiently demanding to warrant suffering this much adverse effect of the decree in silence.

On April 21, 1969, Counsel for Arizona Appellees was advised by the Clerk of this Court as follows:

> "The Court today entered the following order in the above case:
>
> "The motion of the appellant to dismiss the appeal under Rule 60 and the motion of Mr. William

> M. Bennett for a hearing are set for oral argument on April 29, 1969. The Solicitor General is invited to file a brief and present oral argument if he so desires. Mr. Justice Harlan and Mr. Justice Stewart dissent, believing that the action taken by the Court abuses its own processes. See Rule 60. Mr. Justice White, Mr. Justice Fortas and Mr. Justice Marshall took no part in the consideration or decision of this matter."

Neither of the matters specified in this order directly concerned Arizona Appellees. They were not advised that this Court would use the occasion of the April 29, 1969 argument to raise and dispose of vital and complicated issues of gas reserves and mode of payment for divested assets which had warranted Arizona Appellees' intervention and constant attendance in the District Court proceedings. Assuming that Utah Public Service Commission's Jurisdictional Statement did present "the question whether the decree entered below satisfied" this Court's mandate, *Utah Commission* v. *El Paso Natural Gas Co.*, U.S. (1969) (slip op. p. 3.), this Court's notice of hearing put no one on notice that an argument on Utah's motion to dismiss the Jurisdictional Statement would serve as a vehicle for disposing of the merits of the contentions made in the Jurisdictional Statement. Moreover, Utah's Jurisdictional Statement did not challenge the allocation of gas reserves made by Judge Chilson nor did it insist on a cash sale of the divested assets.

The result is grim. Arizona Appellees participated in the Court below as intervenors *as of right* under *Cascade* and Rule 24(a) of the Federal Rules of Civil Procedure. They successfully defended their rights and interests in that forum. They entered appearances as Appellees in this Court and awaited the time when

the appellant might attack those portions of the decree of the District Court affecting Arizona Appellees' interests. But the attack never came from Appellant Utah Commission. Instead, it came in the form of a *fait accompli*, a judgment, of this Court. Disarmed by a lack of notice, Arizona Appellees find themselves adversely affected by the Court's June 16, 1969, judgment without having been afforded an opportunity to brief and argue the merits of the substantive changes in the *Cascade* guidelines ordered by this Court.

II.

FURTHER ALLOCATION OF GAS RESERVES IS CONTRARY TO PUBLIC INTEREST

This Court summarily rejected the allocation of gas reserves ordered by the District Court despite the fact that the decree contains the "meticulous findings made in light of the competitive requirements" demanded by *Cascade*, (386 U.S. at 137) and is based upon gas reserve and market evidence developed in the course of a lengthy hearing, analyzed and evaluated by detailed briefs and oral argument. Although this Court seems to have done little more than to restate a portion of its mandate in *Cascade*, the District Court can be expected on remand to read the June 16 judgment as requiring the allocation of a larger volume of gas reserves to New Company, particularly from the San Juan Basin.

The gas reserves which this Court has ordered be allocated do not come from a bank of fresh uncommitted supplies. Divestiture involves a surgical act of separating system gas reserves which for over ten years have supported long-term service contracts with a large number of public utilities and other customers

on both the pipeline system to be divested by El Paso (northwest division) and the system it will retain (southern division). Both New Company and El Paso must survive the operation, able to continue present service without risk of interruption or higher cost to consumers. These gas reserves provide the lifeblood of El Paso's system. They stand behind the 20-year contracts which El Paso has executed with its customers and the service which the Federal Power Commission has authorized El Paso to render. In this connection, El Paso renders no service which has not been authorized by the FPC.

1. *Cascade* provided guidelines for the District Court in allocating gas reserves:

> "The gas reserves granted the New Company must be no less in relation to present existing reserves than Pacific Northwest had when it was independent; and the new gas reserves developed since the merger must be equitably divided between El Paso and the New Company. * * *" (386 U.S. at 136-7)

The District Court construed these standards in a manner very favorable to New Company. The lower Court's decree allocated to New Company all of the gas reserves it had brought into the merger plus fifty percent of the net additions to gas reserves acquired by the total system since 1957. Considering the fact that the northwest division serves a market about one-fourth the size of that served by the southern division, New Company's share of the reserves acquired since 1957 is most generous. (See El Paso Exhibit 1, tab 6)

2. If the new guideline set out in the June 16, 1969, judgment should allocate to New Company substantial additional gas reserves over and above those involved

in the decree here on review, innocent gas consumers on the southern division in Arizona and elsewhere will be injured through interruptions of gas supplies and higher rates, and competition in the California market will be reduced.[1]

a.) This Court's order would leave El Paso with an inadequate gas supply. The Company would be unable to provide the service to public utility customers on its southern division which they are now receiving under authorizations issued by the Federal Power Commission. (T. 739, 1382) As El Paso's rates are based on its cost of service, El Paso itself might suffer relatively slight injury if it cannot continue present deliveries. Ordinarily it would be allowed the opportunity to earn a full return on its partially idled plant. But El Paso's southern division public utility customers would suffer the consequences in the form of reduced or interrupted gas service and higher rates. This result is quite inconsistent with the view taken by this Court in assessing the legality of a public utility's long-term fuel supply contract under the Clayton Act in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 334 (1961):

> "* * * in the case of public utilities the assurance of a steady and ample supply of fuel is necessary

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[1] The arguments which immediately follow are based primarily on testimony before the District Court at Tr. 739-758. This testimony was developed in light of a suggestion that the District Court order El Paso to divest additional gas reserves capable of delivering 375,000 Mcf per day to the California market. The testimony is relevant here because the District Court actually ordered El Paso to divest 100,000 Mcf per day more than was proposed at the time the evidence was elicited. This Court's June 16 judgment would increase again the divested volume.

in the public interest. Otherwise consumers are left unprotected against service failures owing to shutdowns; and increasingly unjustified costs might result in more burdensome rate structures eventually to be reflected in the consumer's bill. The compelling validity of such considerations has been recognized fully in the natural gas public utility field. * * *"

b.) El Paso has no substitute or surplus gas supplies readily available to replace any substantial additional divestiture ordered by the Court below. (T. 740) Moreover, the divestiture decree will make it more difficult for El Paso to find replacement gas supplies because El Paso is to be cut off from access to Canadian supplies in British Columbia, the only developed gas reserves identified on the record as readily available to serve Western markets. (See T. 136, 667, 1045, 8744-45)

c.) Were El Paso to sign up with American producers for replacement gas supplies, it might seriously increase El Paso's present large investment in prepaid gas, which is a substantial burden on El Paso and its public utility customers. (T. 742-3) This investment, representing expenditures made by El Paso to producers for gas volumes which it was unable to take into its system but which it was contractually obliged to pay for, was estimated at $53,000,000 in 1968. (T. 1668) Each dollar of that investment costs El Paso's public utility customers about 12 cents per annum. (T. 746)

d.) The Permian and Delaware Basins of West Texas are the only apparent sources of replacement gas supplies available to El Paso which were identified on the record. Were El Paso able to purchase replacement gas volumes from those areas, El Paso's cost of rendering service to its public utility

customers on its southern division would increase because

(i) Existing pipelines connecting the San Juan Basin in New Mexico with the southern division pipeline system would become partially idled as a result of increasing the volume of gas allocated to New Company.[2] As the fixed charges on those pipelines would remain stable, El Paso's cost of transporting gas through those lines would increase as throughput declined. (T. 739)

(ii) The wellhead price of new gas well gas in Permian Basin is 16.59¢/Mcf (at 14.73 psia inclusive of tax reimbursement), as compared to the San Juan initial price of 12.74¢/Mcf (at 14.73 psia inclusive of tax reimbursement).[3] In other words, each Mcf of replacement gas could cost El Paso (and, consequently, its public utility customers) at the wellhead 3.85¢ or 30 percent more than the initial price of gas in the San Juan Basin.

(iii) El Paso would be obliged to construct new pipelines to transport the replacement gas supplies from the Permian and Delaware Basins several

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[2] Ironically, the Utah Commission recognized that the San Juan Basin did not contain sufficient gas reserves to effect this Court's purpose:

> "Neither the San Juan Basin nor the Anadarko Basin from which New Company and CIG, respectively, now draw their major source of supply offer the opportunity for the development of substantial additional reserves and both companies must look to Wyoming, which is an area of tremendous potential to develop the future reserves that their systems require." Jurisdictional Statement, pp. 29-30.

[3] See Order No. 381 issued May 12, 1969 in FPC Docket No. R-358, 96 *Fed. Reg.* 7904 (1969).

hundred miles to the Arizona and California markets. El Paso may not be injured if it must build new pipelines and transport gas from more distant and more expensive replacement sources of supply in order to maintain service to existing markets, because it can raise rates to cover higher gas purchase costs and fixed and operating charges on new pipelines. But El Paso's public utility customers must bear the burden by paying higher rates for the privilege of assuring the maintenance of present natural gas service.

e.) El Paso would be disabled from competing in the California market for several years if it were to lose substantial additional volumes of natural gas reserves. (T. 754-5). First, the Company must rebuild its gas reserves to the point where it can maintain the service already authorized by FPC orders. Only then would it be in a position to acquire sufficient reserves to support a competitive project. All of this would take years to effect. Meanwhile, New Company would have no competition from El Paso in serving the California market. Competition "is for the new increments of demand that may emerge with an expanding population and with an expanding industrial or household use of gas." *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651, 660 (1964). Contrary to its apparent intent, this Court's June 16 judgment serves to eliminate El Paso as "a competitive force in California." *Utah Commission* v. *El Paso Natural Gas Co., supra* (slip op. p. 5).

f.) A substantial additional reduction in the level of El Paso's gas reserves may create problems with the Trustee under El Paso's pipeline mortgage indenture,

accelerating sinking fund payments and limiting the financing of new pipelines with mortgage bonds. (T. 749-50) At the least, this would increase the cost of financing expanded pipeline service on El Paso's southern division. At worst, it would render El Paso unable to enlarge its pipeline system further.

g.) This Court's pointed reference to gas reserves in the San Juan Basin brings up another competitive problem. If New Company is saddled with surplus gas reserves on the southern end of its pipeline system (and this Court's new judgment appears to intend such a result), it would amount to an affirmative determination by this Court of the following questions which the Court obviously did not consider:

(i) Is New Company to build its competitive pipeline to California from gas sources only in the San Juan Basin in New Mexico?

(ii) Is New Company to be deprived of the freedom to decide to build a competitive gas pipeline to California from newly developed gas fields in the Rocky Mountain area, particularly Wyoming, the area deemed most important by the Utah Commission in its Jurisdictional Statement? (See Jurisdictional Statement p. 11)

(iii) Is New Company to be denied the opportunity to accept the offers of Westcoast Transmission Company, Limited to supply vast volumes of gas for the California market from sources in British Columbia (Tr. 136, El Paso Exhibit 46), the Yukon and Northwest Territories and the Northern Slope of Alaska? Pacific Northwest Pipeline Corp. was seeking to compete in the California market with gas supplies from Canada just

prior to the unlawful merger;[4] and Canada provides the most readily available gas supplies for a competitive California project today. (See the proposal of Westcoast to bring in gas supplies from the Yukon and Northwest Territories and the Northern Slope reported in *The Wall Street Journal* on June 24, 1969, p. 5.)

(iv) Is Pacific Gas Transmission Company to be allowed to enjoy a monopoly in the supply of gas from Canada to the California market of its parent Pacific Gas & Electric Company[5] because New Company is burdened with the necessity of finding a market for surplus gas reserves located a thousand miles south of the Canadian supply area?

There is no readily apparent reason why the allocation of gas reserves should be effected in a manner giving present and future consumers on New Company's system an advantage at the expense of present consumers on El Paso's southern division. The District Court is sitting as a court of equity. "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides determinations of courts of equity." *Meredith* v. *Winter Haven,* 320 U.S. 228, 235 (1943). Equity is the instrument for "nice adjustment and reconcilia-

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[4] *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651, 660 (1964).

[5] See *California Gas Producers Assn.* v. *Federal Power Commission,* 383 F. 2d 645 (9th Cir. 1967). "[I]n California there are only two significant wholesale purchasers—Pacific Gas & Electric in the north and the Southern Companies in the south." *United States* v. *El Paso Natural Gas Co.,* 376 U.S. at 660.

tion between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329-30 (1944).

This Court should require the formulation of a decree which, while effectively eliminating the antitrust violation and restoring competitive conditions, at the same time effects "as little injury as possible to the interest of the general public". *United States* v. *American Tobacco Co.,* 221 U.S. 106, 185 (1911). "Divestiture is itself an equitable remedy designed to protect the public interest." *United States* v. *du Pont & Co.,* 366 U.S. 316, 326 (1961).

The public whose interest is to be considered and protected surely includes gas consumers living in Arizona as much as it includes those in California. The gas consumers of Arizona are guilty of no wrongdoing here. They have been diligent in protecting their rights. They are entitled to equal treatment with other gas consuming areas affected by the divestiture decree. "And the Equity is equal between persons, who have been equally innocent, and equally diligent." Story, *Commentaries on Equity Jurisprudence* 75 (2d ed. 1839).

III.

CASH SALE OF ASSETS IS CONTRARY TO PUBLIC INTEREST

This Court has instructed the District Court to dispose of the divested properties by a cash sale, citing *United States* v. *du Pont & Co.,* 366 U.S. 316 (1961). "Only a cash sale will satisfy the rudiments of complete divestiture." (slip op. p. 7.) The fact that the proposed mode of divestiture would reduce El Paso's income tax burden was rejected as a justification. "We

have emphasized that the pinch on private interests is not relevant to fashioning an antitrust decree, as *the public interest* is our sole concern." (*Ibid.*, emphasis supplied.)

1. A divestiture of El Paso's assets through a cash sale is injurious to the public interest, a fact that might have been developed had this Court given notice that the issue was to be heard and decided. Unlike du Pont, El Paso is a regulated company serving public utilities under long-term contracts.[6] Provisions of a remedial decree which increase El Paso's cost of providing natural gas service simply serve to penalize innocent public utility customers in the form of higher rates. This result must be avoided. See *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 334 (1961).

Since 1962, when this Court nullified Federal Power Commission approval of El Paso's acquisition of Pacific Northwest Pipeline Corp. (*California* v. *Federal Power Commission*, 369 U.S. 482 (1962)), El Paso has operated its northwest division under temporary certificates of public convenience and necessity. As a consequence, the Company has not been able to finance over $60,000,000 in pipeline additions to the northwest division with mortgage bonds. (T. 1663-4, 1706) Instead it has had to raise the necessary funds through the sale of debentures bearing interest rates higher than that being paid on the mortgage bonds.

Under the cash sale ordered by this Court, El Paso must deposit all of the proceeds of the sale with the Trustee in accordance with the requirements of the

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[6] There is another fundamental distinction. In *duPont*, this Court was concerned with the disposition of the stock of General Motors Corporation and not with its assets. 366 U.S. 316 (1961).

mortgage indenture. (T. 759) This means that El Paso's debentures will remain outstanding after divestiture as part of El Paso's capitalization, and the rates charged to the public utility customers on the southern division will reflect the higher interest rate of those debentures issued for the benefit of customers on the northwest division pipeline system being divested.

Southern division customers are injured by a cash sale in another way. El Paso will divest the northwest division properties which produce substantial revenues, but the Company will not experience any reduction in its annual sinking fund obligations under the indentures governing its mortgage bonds and debentures. In other words, the decline in El Paso's revenues will not be offset by a corresponding decline in current cash flow requirements attributable to the debt incurred to finance the original acquisition and expansion of the divested properties. (T. 893) To the extent that the depreciation allowance on the properties remaining in El Paso's hands does not provide sufficient funds to meet the sinking fund requirements of this large amount of debt, El Paso's credit (and, therefore, its ability to finance future pipeline expansions on its southern division) will be adversely affected.

In short, a cash sale of the divested assets provides neither an equitable nor a clean-cut solution. It promises to leave a residue of burdensome costs and cash flow complications which could increase the cost of gas to public utilities on the southern division of El Paso and jeopardize El Paso's capability to finance the construction programs needed to meet its southern division market requirements in the future.

A crippled El Paso might appear an attractive prospect to those who take the view that the purpose of a remedy in this case is to punish El Paso for violating the federal antitrust law. But that result would constitute a grievous blow to the public utilities and gas consumers looking to El Paso as their source of natural gas supplies.

2. Effective divestiture with a dissolution "of the intercorporate community of interest which we find to violate the law" *du Pont, supra* at 331, can be effected without a cash sale of the assets. This could be accomplished by transferring the divested assets to New Company in exchange for its common stock and the assumption of approximately $170 million of El Paso's indebtedness, followed by a spin-off by El Paso of the New Company stock to El Paso's 120,000 shareholders. El Paso would receive neither earnings nor profit on the transaction.

A spin-off is an appropriate device of divestiture. It was successfully employed in effecting dissolution of the "intercorporate community of interest" in the famous *Standard Oil*[7] and *American Tobacco*[8] cases.

A cash sale of the divested assets may involve the payment by El Paso of up to $50 million in taxes. This possibility is deemed by this Court "not relevant to fashioning an antitrust decree". (Slip op. p. 7)

We respectfully submit that where, as here, the Court has available to it effective modes of divestiture which have insignificant tax consequences, the deliberate choice of a remedy in a civil antitrust suit brought by

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[7] *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911).

[8] *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911).

the United States requiring payment of substantial taxes represents an award to the plaintiff which was neither sought by the United States in its complaint nor justified by any evidence of record.

The antitrust laws specify in detail the remedies available to the Government in enforcing them. The "Court's task is finished when it gives effect to the purposes of the law, evidenced by the various remedies it affords for different situations." *United States* v. *Cooper Corp.,* 312 U.S. 600, 608 (1941). In *Cooper,* the United States was not permitted to maintain an action for treble damages under section 7 of the Sherman Act[9] because that remedy was not specified in the statute. Legislation was required to remedy the statutory deficiency. The case at hand is analagous.

There is no provision in the present antitrust laws permitting the award of large sums to the Government where the Government neither seeks such relief as part of a damage claim nor justifies the award in terms of injury suffered. It is not as if the heavy tax payments are the unintended consequence of the only available remedy. With alternative effective divestiture remedies available, the choice of the cash sale represents an improper attempt to enlarge the statutory remedies made available by Congress.

IV.

OTHER DETERMINATIONS NOT CHALLENGED IN THIS COURT SHOULD NOT BE REVERSED

The District Court had before it a large number of issues relating to the division of assets on divestiture. Nine different applicants who desired to purchase the

[9] Act of July 2, 1890, c. 647, 26 Stat. 209, 210.

divested properties were heard. Weeks of trial were spent in analyzing, challenging and rebutting the various proposals. Although the case was diligently moved along, two years have elapsed since *Cascade*.

The District Court decided many issues which no one saw fit to challenge in this Court. They are generally identified in the table of contents of Judge Chilson's Opinion. Among the matters uncontroverted here are the list of physical assets, gas sales agreements and investments to be divested; and the appropriate manner of disposing of the West Coast and Northwest Production Company stock, tax loss carryover, Mobil notes and inter-company and other contracts.

The summary vacation of the District Court's judgment throws all of this accomplishment into the discard. Everything is once more open to challenge. The proceeding below, which encompassed over 11,000 pages of transcript, has been nullified. Such a waste of effort represents a clear frustration of this Court's direction to the District Court five years ago "to order divestiture without delay." *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651, 662 (1964).

If this Court is to remand this case (a measure which Arizona Appellees neither seek nor desire), its judgment ought to husband what has not been challenged and what may be preserved of the lower Court's decree. The District Court should be encouraged to utilize the existing voluminous record, to the extent possible, in redeciding any specific issue reopened by the remand.

V.

A QUORUM PROBLEM EXISTS

A quorum of six justices participated in the June 16, 1969 decision. 28 U.S.C. § 1. Since then, Mr. Chief Justice Warren has retired from the Court, leaving only five justices presently in office who considered themselves qualified to participate in the determination of this case.

Unless Mr. Chief Justice Burger, or the yet-to-be-appointed justice who is to fill the vacancy created by the resignation of Mr. Justice Fortas, is willing to participate in the consideration of this petition for rehearing, a quorum of qualified justices will not exist. In which event, the case should be resolved in accordance with the statutory provision for the disposition of cases in which a quorum is lacking. 28 U.S.C. § 2109.

This case began with the filing of a civil antitrust suit by the United States in July 1957. This was subsequent to the time when Mr. Chief Justice Burger was an Assistant Attorney General. The United States Court of Appeals for the District of Columbia Circuit did review the Federal Power Commission's approval of El Paso's acquisition of Pacific Northwest Pipeline Corporation in 1961 when Mr. Chief Justice Burger was a member of that Court, but he did not participate on the panel which heard and decided the case. *California* v. *Federal Power Commission,* 296 F.2d 348 (D.C. Cir. 1961), *rev'd* 369 U.S. 482 (1962).

If this Court cannot assemble a quorum to hear this petition for rehearing, the Chief Justice may return

the matter to the United States Court of Appeals for the Tenth Circuit for decision. Or, if a majority of the qualified justices are of the opinion that the case cannot be heard and determined at the next ensuing term, the Court shall enter its order affirming the judgment of the District Court. 28 U.S.C. § 2109.

CONCLUSION

This Petition for Rehearing, directed specifically to the questions of the allocation of gas reserves and the permissible modes of payment for the divested properties, should be granted.

If rehearing is denied, this Court should, as a minimal alternative, amend its judgment of June 16, 1969 to

1. Affirm the District Court's decision on the allocation of gas reserves between El Paso and New Company;

2. Affirm the District Court on all other aspects of its decree which were not challenged before this Court;

3. Authorize the District Court to adopt any mode of payment for the divested properties which, while quickly and effectively dissolving "the intercorporate community of interest", will minimize the adverse consequences of the divestment on gas consumers on both the system being divested and on El Paso's southern division; and

4. Instruct the District Court to utilize to the maximum extent possible, the present record in the case in

determining those issues on which this Court specifically overrules the District Court.

Respectfully submitted,

STATE OF ARIZONA, ex rel.
THE ARIZONA CORPORATION COMMISSION
ARIZONA PUBLIC SERVICE COMPANY
TUCSON GAS & ELECTRIC COMPANY

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CERTIFICATE OF COUNSEL

I certify that this petition is presented in good faith and not for delay.

JOHN T. MILLER, JR.

July 1969

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IN THE

Supreme Court of the United States

October Term, 1968
No. 776

UTAH PUBLIC SERVICE COMMISSION,
Appellant,
v.
EL PASO NATURAL GAS COMPANY, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

JOINT PETITION FOR RECONSIDERATION AND FOR HEARING ON THE MERITS

of

CASCADE NATURAL GAS CORPORATION, CALIFORNIA-PACIFIC UTILITIES COMPANY, INTERMOUNTAIN GAS COMPANY, THE WASHINGTON WATER POWER COMPANY, AND WASHINGTON NATURAL GAS COMPANY, *Appellees*.

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METROPOLITAN PRESS SEATTLE, WASHINGTON

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CASCADE NATURAL GAS CORPORATION, CALIFORNIA-PACIFIC UTILITIES COMPANY, INTERMOUNTAIN GAS COMPANY, THE WASHINGTON WATER POWER COMPANY, AND WASHINGTON NATURAL GAS COMPANY, *Appellees*.

NOW COME Cascade Natural Gas Corporation, California-Pacific Utilities Company, Intermountain Gas Company, The Washington Water Power Company, and Washington Natural Gas Company, intervenors in the case below and Appellees herein, and respectfully jointly pray the Court to grant reconsideration of the majority decision rendered in this cause on June 16, 1969. The grounds upon which this petition is based are as follows:

I. The Majority Erred in Deciding the Merits of the District Court's Decree and Prescribing New Divestiture Standards Without Giving the Parties an Opportunity to Submit Briefs on the Merits and the Issues Involved

The fundamental error of the majority decision (which must have led to the other errors discussed herein) was in vacating a carefully prepared District Court decree which was in full compliance with this Court's mandate in *Cascade Natural Gas Corporation v. El Paso Natural Gas Co.,* 386 U.S. 129 (1967) *(Cascade),* without having first accorded the parties who devoted 57 days in the trial of this case an opportunity to submit briefs or oral argument on the merits of that decree. New issues have been raised by the majority opinion which were not even suggested by the jurisdictional statement of the Utah Public Service Commission (Utah) and which were not noted for argument before this Court on April 29, 1969.

As the record shows, the posture of this case just prior to the notice of April 21, 1969 was as follows:

Utah filed a jurisdictional statement which attacked the District Court's decree on the single ground that Colorado Interstate Corporation's (CIG) acquisition of the Northwest Division properties of El Paso Natural Gas Company (El Paso) would be a violation of Section 7 of the Clayton Act. Utah's jurisdictional statement did not attack the *plan or method of acquisition* of the assets of El Paso's Northwest Division, or the completeness of the severance of the two systems which would result. It was limited solely to the allegation that the acquisition by CIG would lessen competition or tend to create a monopoly.

Appeals by the United States, The People of the State of California and Southern California Edison Company had been initiated but were withdrawn in January, 1969 without having been perfected.

On or about February 24, 1969, Utah filed a motion to dismiss its appeal. At that time no other party had filed any documents or briefs except the motion to affirm the District Court's decree filed by Southern California Gas Company and Southern Counties Gas Company. Thus, at the time of Utah's motion to dismiss its appeal all parties to these proceedings were satisfied that the District Court's decree was in full compliance with this Court's mandate in *Cascade*.

Some time in March or April of 1969, a Mr. William Bennett and two others, none of whom was or is a party to these proceedings, filed some documents attacking Utah's motion to dismiss its appeal. Mr. Bennett requested that he be appointed to represent the public. These documents were never served on these petitioners.

By letter dated April 21, 1969, the Clerk of this Court advised all parties as follows:

> "The Court today entered the following order in the above case:
>
> "'The motion of appellant to dismiss the appeal under Rule 60 and the motion of William M. Bennett for a hearing are set for oral argument on April 29, 1969. The Solicitor General is invited to file a brief and present oral argument if he so desires. Mr. Justice Harlan and Mr. Justice Stewart dissent, believing that the action taken by the Court abuses its own processes. See Rule 60. Mr. Justice White, Mr. Justice Fortas and Mr. Justice Marshall took no part in the consideration or decision of this matter.
>
> Very truly yours,
>
> John F. Davis, *Clerk*
> By E. T. Lyddane.
> *Assistant Clerk*'"

This brief notice was received by your petitioners herein not earlier than April 23, 1969. Thus, all parties receiving the above notice were given at the most seven (7) days' notice of an oral argument limited to two procedural questions, to-wit:

(1) The motion of Utah to dismiss its appeal under Rule 60; and

(2) The motion of Mr. Bennett.

The only party invited by this notice to submit a brief was the Solicitor General. By arrangements with the Clerk of this Court all parties, including the Solicitor General, El Paso, CIG and petitioners were allotted in total but one hour to argue the above two issues before the Court. Mr. Bennett, on the other hand, was allocated an hour to present his views.

No party was notified, advised, or requested by the Clerk or by order of the Court to submit briefs or to present oral argument on any of the following issues, all of which are inherently involved in the majority opinion:

(1) Whether the plan and method of acquisition ordered by the District Court complied with this Court's mandate in *Cascade*.

(2) Whether a "cash sale" was the only method under *Cascade* to accomplish "complete divestiture."

(3) Whether the majority's conclusion that an "assumption" of $170,000,000 of El Paso's indebtedness by New Company is the actual method and means of financing its debt capital approved by the District Court's decree.

(4) Whether New Company must be compelled to

finance its debt portion of the acquisition at current high interest rates, and is therefore not entitled to take advantage of "rolling over" that portion of the existing low cost debt attributable to the properties to be divested.

(5) Whether an allocation to New Company of additional reserves beyond the division found by the District Court to be "equitable" is required to meet the mandate of *Cascade.*

It would appear reasonable and fair that had this Court on April 21, 1969 intended that, as a result of the oral argument set April 29, 1969, the above issues would be raised by the Supreme Court and a new and different divestiture mandate created, the parties would have been given the right to submit briefs on these issues with reference to the full record, and to present oral argument.

Instead, the majority precipitously rendered their decision creating new divestiture guidelines at variance with *Cascade,* all without any notice to the parties and without the benefit of briefing or argument by the parties. The majority's lack of familiarity with the record before the Court is illustrated by the following quotation from the opening of Part II of the Opinion:

> "Our mandate directed complete divestiture. The District Court did not, however, direct complete divestiture. Neither appellants nor any party supporting the dismissal argues that the District Court did so. Rather they argue that the disposition made by the District Court was the best that might be made without complete divestiture." (slip opinion, p. 6)

To the contrary, these petitioners in their Joint Motion to Affirm or Dismiss, page 3 (filed herein upon entry of this Court's order of April 21, 1969) contended that:

"Acquisition of El Paso's divested properties by CIG will fully comply with the mandate and the guidelines respecting divestiture without delay hitherto ordered by this Court."

Also in our Statement of Position filed for the Argument on April 29, 1969, we said:

"We respectfully submit that divestiture has been accomplished by the District Court in meticulous compliance with the mandate of this Court in *Cascade.*" (p. 3)

The Solicitor General, in the Appendix to his Memorandum in response to the order of April 21, 1969, referred in detail to the restrictions upon conversion of the preferred stock which would insulate the New Company and CIG from El Paso and would result in a "complete divestiture." (pp. 8-9)

Further, at page 11 of the Appendix:

". . . The terms of the divestiture plan fully comply with and implement the guidelines set forth in this Court's *Cascade* opinion (see the Statement, *supra,* pp. 4, 7-10). . . ."

And at page 17 of the Appendix:

". . . The divestiture approved by the district court would create a strong and viable potential competitor for the California market upon terms that meet the standards for divestiture announced by this Court in *Cascade*. . . ."

See also Memorandum of Colorado Interstate Corporation, page 6, stating that the District Court decision conforms to the mandate of *Cascade.*

The majority decision was premature for the further reason that the record before this Court was not complete at June 16, 1969. We are informed that the Imple-

menting Documents filed in the District Court August 10, 1968 and approved by the Court in its final order entered November 7, 1969, have not been transmitted to the Supreme Court as of the date hereof. The significance of this deficiency in the record before this Court is illustrated by the following quotation from (slip opinion, p. 3) the majority decision:

> "Under the plan approved by the District Court, El Paso receives 5,000,000 shares of New Company nonvoting preferred stock, convertible into *common stock* at the end of five years. *What the conversion ratio* will be is *not known;* but, *it is said,* there will be provisions to restrict El Paso control over the New Company." (Emphasis added)

The obvious reason for the uncertainties italicized above is that the Implementing Documents were apparently not available.

The conversion ratio of 0.35 shares of *Colorado Interstate* common stock (not New Company, as the majority opinion implies) for each share of New Company preferred is set out precisely at page 13 of Exhibit III of the Implementing Documents. The elaborate and conclusive restrictions against conversion of this preferred stock by El Paso or its officers, directors or certain stockholders are set forth at pages 25 to 27 of the same Exhibit and the Restrictive Provisions filed as the last document of the Implementing Documents. Had the record in this Court been complete, there would have been no reason for the supposition of these deficiencies by the majority.

The Implementing Documents demonstrate that the plan of divestiture ordered by the District Court, employing non-voting preferred stock, would result in a com-

plete severance of control of New Company by El Paso in accordance with *Cascade*. They show that the District Court's decree complies fully with the mandate in *Cascade* wherein this Court stated, with reference to the issue of stock for assets, the requirement that the plan must:

> ". . . make sure that the New Company's stock does not end up controlled by El Paso interests. . . . and conditions must be imposed to make sure that El Paso interests do not acquire a controlling interest. . . ." (386 U.S. at 141)

The Implementing Documents contain those very conditions which ensure that El Paso does not acquire a controlling interest.

The majority rely upon *United States v. du Pont & Co.*, 366 U.S. 316 (1961) *(du Pont)*, for their decision that "complete divestiture" cannot be achieved except by a cash sale. In *du Pont*, the company's divestiture plan, which was rejected by this Court, would have permitted du Pont to retain all attributes of ownership of the General Motors stock, including the right to receive dividends and a share of assets on liquidation, except the right to vote. Voting rights were to be "passed through" to the du Pont stockholders. At 366 U.S., page 331, the Court pointed out that two thirds of du Pont's General Motors stock would be voted by du Pont shareholders (upwards of 40 million shares), the du Pont shareholders would be, *ipso facto*, General Motors voters whose interest would be to vote in such a way that General Motors would favor du Pont and thus the "intercorporate community of interest" would be continued.

Under the District Court's decree herein, the New

Company stock to be issued to El Paso would be *non-voting* preferred, convertible to common voting stock of *CIG* only by a holder who is not an officer or director of El Paso, does not own or have voting power of more than ½ of 1% of El Paso common stock outstanding and meets certain other restrictive conditions (Implementing Documents, Restrictive Provisions). El Paso would have only the non-voting preferred stock with a limited dividend and no power, directly by itself, or indirectly through its own stockholders, to control New Company so as to favor El Paso. Thus the deficiencies of the du Pont plan, which relied solely on divestiture of du Pont's own voting rights, are not present in the District Court's decree in this case.

Another vital distinguishing factor not present in *du Pont* is that here El Paso, CIG and New Company will all be under the continuing jurisdiction and surveillance of the Federal Power Commission which will protect the public interest in all markets in which they will serve.

Your petitioners who are local distributors of natural gas in the Pacific Northwest and now secure their gas supplies from El Paso and will ultimately depend upon New Company for their gas supplies urge this Court to reconsider this case and set the matter for hearing after first giving all parties adequate opportunity to submit briefs on the merits and the issues raised by the majority's opinion as set forth earlier herein.

II. The Majority Erred in Changing Its Cascade Guidelines for Divestiture by Prohibiting New Company from "Rolling Over" the Debt and Requiring a Cash Sale

In *Cascade* this Court set forth the guidelines for divestiture of El Paso's Northwest Division properties.

None of these guidelines required a cash sale. None of the guidelines in *Cascade* prohibited New Company from taking advantage of that portion of the low-cost imbedded debt of El Paso attributed to the Northwest Division. Neither the District Court nor the attorneys for the 24 parties before the District Court interpreted *Cascade* to require a "cash sale" or to prohibit a debt "roll over."

The majority opinion, written without the benefit of the entire record, briefs or oral argument, in creating two new guidelines, stated as follows:

> "Retention by El Paso and its stockholders of the preferred stock is perpetuation to a degree of the illegal intercorporate community. Assumption of $170,000,000 of El Paso's indebtedness helps keep the two companies in league. The severance of all managerial and all financial connections between El Paso and the New Company must be complete for the decree to satisfy our mandate. Only a cash sale will satisfy the rudiments of complete divestiture." (slip opinion, p. 7)

A. *The Error in Regard to Assumption of Indebtedness.*

The majority opinion states as follows:

> "Assumption of $170,000,000 of El Paso's indebtedness helps keep the two companies in league."

This statement is subject to the construction that New Company cannot now utilize the same bond and debenture holders of El Paso and thereby obtain the advantage of El Paso's existing interest rates on its bonds and debentures, thus precluding New Company from obtaining an effective interest rate of 5.5%. If this is the interpretation to be placed on this unfortunate statement, it simply means that New Company, to accomplish a divestiture,

would have to sell $158,000,000 (not $170,000,000)[1] of new pipeline mortgage bonds and debentures at the current rate for such bonds and debentures, which rate is no less than 8.5% and could be as high as 9% for a new and unseasoned company.

If New Company is required to sell its bonds at current interest rates as referred to above, instead of being able to "roll over" a portion of El Paso's indebtedness, the impact on New Company as well as on the gas purchasers in the Pacific Northwest will be severe. The economic result would simply be to add approximately $5,000,000 to New Company's interest charges each year.[2] This follows because the interest rate on $158,000,000 of debt under a debt "roll over" method would be 5.5% as opposed to 8.5 to 9%[3] if the majority intended that a debt "roll over" be prohibited.

The record before the District Court demonstrated that under the District Court's plan of divestiture, New Company's annual interest charges would be approximately $8,690,000 per year on a "roll over" basis. Under the majority opinion, if New Company cannot take advantage of the "roll over" of debt at 5.5% the annual interest cost to New Company jumps to about $13,430,000 per year representing the annual interest cost at 8.5%. It is inconceivable that the majority opinion intended such an interpretation to follow from its statement that the "as-

1. The Implementing Documents (Exhibit IV, p. 2, line 7) show the debt portion at April 30, 1968 was equal to the tax basis of the properties to be divested which amounted to $158,000,000.

2. This figure and other figures showing the economic effect of the majority opinion are not in the record as such, but can be computed from figures which are in the record.

3. The Court may take official notice of the prime interest rate.

sumption of $170,000,000 of El Paso's indebtedness helps keep the two companies in league." This great increase in interest costs is not necessary to accomplish a "complete divestiture" for the "roll over" of debt would not keep the two companies "in league" as the majority stated.

Notwithstanding the majority opinion's statement quoted above, the evidence shows that New Company is not "assuming El Paso's indebtedness." The words "assumption of indebtedness" are an erroneous description of the facts and contrary to the actual method approved by the District Court.

The testimony before the District Court and the Implementing Documents approved by the District Court as part of the plan of divestiture between El Paso and CIG show there is neither in law nor in fact an "assumption" by New Company of El Paso's indebtedness. The fact is that New Company will issue debentures and bonds aggregating $158,000,000 in its own name and New Company will execute a mortgage indenture in its own name with the bondholders. El Paso's debentures and bonds in the same amount and its mortgage on the assets to be divested will be satisfied, so that El Paso will not have any continuing liability or connection with New Company.[4] Thus, there will be no "assumption" of indebtedness by New Company but in fact there will be a substitution or novation. The fact that New Company and El Paso will have the same bondholders is of no consequence as many utilities, gas, electric or telephone, sell their bonds to the same buyers, just as they may use some of the same banks for short term loans.

4. See Implementing Documents, Part I, pp. 10-12.

We therefore urge the Court upon reconsideration to clarify and change its opinion in such a way as to make clear that there is no restriction intended prohibiting New Company from "rolling over" the debt so that it and its consumers may take advantage of the lower 5.5% interest rate available under the "roll over" of debt.

B. *The Error of the Majority in Requiring a Cash Sale.*

If a cash purchase of the assets is required (assuming at this point the debt "roll over" is acceptable), New Company would require approximately $6,800,000 additional annual revenue to earn a fair rate of return on its investment. These added revenues would have to be supplied by the gas purchasers of New Company as they will be the source of New Company's revenue.

The adverse impact on these purchasers will be even more damaging if *both* new divestiture requirements, to-wit: a "cash sale" and the restriction against taking advantage of the "roll over" debt of 5.5% are imposed. Under these two new requirements, CIG (or any applicant for acquisition) would be selling its common stock to raise up to $105,000,000 to acquire funds to purchase the equity portion of the assets and issuing $158,000,000 of its bonds and/or debentures to take care of the debt portion. The debt portion, as previously noted, could not be secured currently at less than an interest rate of about 8.5%. The result is that even if such a scheme of divestiture could be financed, New Company would then require from the Federal Power Commission approval of a rate of return sufficient to produce additional revenue of at least $11,000,000 a year over existing revenue. This additional $11,000,000 a year would be needed to pay a

fair return on the common stock and to pay the higher interest charges required.

The impact of the majority opinion discussed above demonstrates that the purpose of divestiture could be frustrated and defeated. As pointed out in *Cascade*, the purpose of divestiture was to create a "viable" new company capable of competing for the California market, and at the same time render adequate service to the Northwest customers. Under the majority opinion of June 16, 1969, New Company, assuming it could finance the divestiture, would not be a "viable" company capable of financing a competitive new project to serve the California market.

If divestiture is to be accomplished so that a new company will be a "viable entity" capable of performing its responsibilities in the Pacific Northwest and providing competition for the California market, reconsideration must be granted to afford the Court an opportunity to review its June 16, 1969 decision. This Court should set the case for hearing preceded by briefs from the parties related to the record and facts upon which the District Court predicated its decision, and to the new issues created by the majority opinion.

III. The Majority Erred in Requiring Reallocation of Reserves at Variance with *Cascade*

The majority opinion extends *Cascade's* guidelines respecting divestiture of gas reserves without adequate definition or consideration of the effects thereof.

This Court stated clearly in *Cascade* that the new gas reserves developed since the merger of Pacific Northwest

Pipeline Corporation into El Paso must be equitably divided between El Paso and the New Company. The record before the District Court upon which it made an "equitable division" of such reserves is voluminous and highly technical. Its decision is based on the premise, stated by this Court in *Cascade,* and repeated in the majority opinion (slip opinion, p. 5) that the object of allocation of gas reserves must be to place New Company in the same relative competitive position *vis-a-vis* El Paso in the California market as that which Pacific Northwest enjoyed immediately prior to the illegal merger.

There is no finding in either *United States v. El Paso Natural Gas Company,* 376 U.S. 651 (1964), or in *Cascade* that the reserves which Pacific Northwest had in 1957 were in fact sufficient to mount a pipeline project to California which would warrant certification by the Federal Power Commission. The two decisions are based on the fact that Pacific Northwest was a competitive factor in the California market merely because it had the *probable* capability of entering that market. Until the majority decision of June 16, 1969, this Court, the District Court and all parties have been concerned with "the probabilities and not certainties," posing a threat of competition for the California market. *United States v. El Paso Natural Gas Company, supra,* at page 658, quoting from *Brown Shoe Co. v. United States,* 370 U.S. 294, 323. It is in this context that the lower court formulated its equitable division. Neither *Cascade* nor the District Court intended or required an instant, full-fledged, *de facto* eompetitor in California as the new mandate of this Court appears to require. The requirement was that New Company have reserves reasonably

comparable to those Pacific Northwest Pipeline Corporation might have been expected to have acquired on its own, and to constitute a reserve nucleus which, by aggressive supplementation during a reasonable period after initiation of its operations, would form the basis for a project by New Company to bring competitive gas to California.

Nowhere does the majority determine that the District Court's decision was inequitable, nor does any party to this case so argue, nor did Utah so contend in its Jurisdictional Statement. The majority opinion simply states that the reserve position of New Company must be strengthened, but no specific guidelines as to the extent or manner thereof are prescribed. We submit the allocation of reserves by the District Court was consistent with *Cascade* and should not be changed. The majority erred in trying to reallocate reserves without the benefit of briefs and references to the record. Its opinion therefore raises many new questions pertaining to reserves. For example: Does this Court intend that New Company must have sufficient San Juan reserves to immediately undertake a project to California? If the additional reserves to be allocated to New Company shall prove to be less than adequate for a California project, must those reserves now dedicated to service in the Pacific Northwest be diverted to a California project, thereby impairing New Company's ability to serve the Pacific Northwest? These are but a few of the questions which immediately come to mind, strongly suggesting extensive further confusion and delay in the attempted carrying out of this Court's new mandate, with likely further appeals thereafter.

We are not here dealing with the relatively simple consequences impinging on a relatively small number of individual stockholders, as was the case in *United States v. du Pont & Co., supra.* We are here dealing with fully regulated companies engaged in public service upon whose resources and capabilities the interest and welfare of countless ultimate customers for natural gas service are dependent. The consequences of a decision rendered without full and complete consideration of the interests of all parties concerned can and will have far-reaching adverse effects.

CONCLUSION

The result of the majority's decision is that it is impossible to comply with it without unnecessarily inflicting a harsh impact upon all who will be affected by it.

The fundamental objectives of the divestiture, as clearly delineated in *United States v. El Paso Natural Gas Company, supra,* and *Cascade,* are to restore a competitive force in the California market by a viable new company which would be able to adequately serve the existing Northwest customers. This court never intended, in its prior decisions, that the new company to emerge from the divestiture should be immediately able to sell natural gas in California, as the majority obviously now intends. Nor was it the intent that the new company should start its existence with such a financial handicap that its customers in the Northwest would be immediately subjected to increased costs that would inevitably result from the new requirements of the majority's decision regarding debt and equity financing.

The decision in *Cascade* is clear that acquisition of the

divested assets may be paid for in stock, so long as there is an immediate termination of El Paso's control over them. The District Court's decree and the comprehensive restrictions upon ownership of stock directly or indirectly precluding control of New Company by El Paso, its officers, directors and stockholders ensure that result. The decision in *du Pont* does not preclude an acquisition by issuing stock if adequate restrictions are imposed and the fact that El Paso, CIG and New Company will be subject to the continuing jurisdiction of the Federal Power Commission will add an assurance, not present in the *du Pont* case, that the activities of each must clearly serve the public interest.

The District Court decision, so carefully in tune with *Cascade,* which balanced the interests of consumers in the Pacific Northwest, New Company, and the potential customers in California, should not be disturbed until this Court has an opportunity to study the briefs of the parties on the merits and on the impact of the majority opinion of June 16, 1969. Upon a full hearing and a review of the complete record the decision of the District Court should be affirmed.

To the end that there may be a successful divestiture, fulfilling the purpose of Section 7 of the Clayton Act, these petitioners respectfully submit that this court should take the following action:

1. Immediately stay further proceedings and withhold any mandate to the District Court.

2. Grant this Petition for Reconsideration and set the case for hearing before the Court, on the merits, with full

opportunity to all parties who have a true interest in the proceedings to submit briefs and oral arguments.

3. After hearing, affirm the decree of the District Court.

Seattle, Washington
July 8, 1969

Respectfully submitted,

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Counsel of Record for
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California-Pacific Utilities Company
Intermountain Gas Company
The Washington Water Power Company
Washington Natural Gas Company

Of Counsel:

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JOHN W. CHAPMAN, for
Washington Natural Gas Company.

CERTIFICATE OF COUNSEL

I, Richard B. Hooper, one of the attorneys for the appellee-petitioners named herein, certify that this petition is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

RICHARD B. HOOPER
Counsel of Record for Appellee-Petitioners

No. 776

IN THE

Supreme Court of the United States

October Term, 1968

UTAH PUBLIC SERVICE COMMISSION,

Appellant,

vs.

EL PASO NATURAL GAS COMPANY, et al.,

Appellees.

On Appeal from the United States District Court for the District of Utah

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MOTION TO SET FOR HEARING MOTION TO AFFIRM BY SOUTHERN CALIFORNIA GAS COMPANY AND SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA

AND

APPLICATION FOR STAY OF ISSUANCE OF MANDATE

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AND

APPLICATION FOR STAY OF ISSUANCE OF MANDATE

To The Honorable Warren Earl Burger, Chief Justice of the Supreme Court of the United States:

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, gas public utilities serving 11-million people in central and southern California, Intervenors in the case below and Appellees herein, on December 19, 1968, filed herein their Motion to Affirm the judgment of the United States District Court for the District of Utah in

this proceeding. That motion has not been set for hearing. There has been neither any briefing nor any oral argument concerning whether said motion should be granted. It is the specific purpose of this motion to request this Court to set our Motion to Affirm for hearing.

On November 25, 1968, the Utah Public Service Commission filed in this proceeding its Jurisdictional Statement. On December 19, 1968, Southern California Gas Company and Southern Counties Gas Company of California filed herein their Motion to Affirm the judgment below. On February 24, 1969, the Utah Public Service Commission served its Motion to Dismiss Pursuant to Rule 60(2) in which it stated:

> "Pursuant to Rule 60(2) of the Rules of the Supreme Court of the United States the Appellant, Utah Public Service Commission, hereby moves the Court for an order dismissing its appeal in the above entitled cause."

On April 21, 1969, this Court issued its order in which it stated:

> "The motion of appellant to dismiss the appeal under Rule 60 and the motion of William M. Bennett for a hearing are set for oral argument on April 29, 1969. The Solicitor General is invited to file a brief and present oral argument if he so desires."

Neither by that order nor by any other order did this Court set for hearing the Motion to Affirm filed by our Companies on December 19, 1968. Oral argument was held on the motions of the Utah Public Service Commission and of William M. Bennett on April 29, 1969.

This Court's opinion issued June 16, 1969, lists a number of Appellees which it alleges supported Appellant's motion. The assertion that Southern California Gas Company and Southern Counties Gas Company of California at said oral argument supported Appellant's motion is totally in error. We took no part whatsoever in the oral argument, as the records of this Court must clearly reflect. We neither requested nor were granted the opportunity to appear at the oral argument concerning Appellant's motion to dismiss its appeal. Our concern lay solely as to the merits of the issues and not as to whether or not Utah had the procedural right to dismiss its appeal. For that reason we did not seek to argue these ancillary issues. It has been clear to us throughout this proceeding that an examination of the issues on the merits would necessarily require affirmance of the judgment below. We sought once and for all to have a determination on the merits so that the gas industry could proceed as it must to meet the ultimate needs of the gas consumers. Litigation does not supply required gas supplies to gas consumers.

We were astounded when this Court issued its decision on June 16, 1969, to recognize that the Court was under a misapprehension that it had in fact held a hearing on the merits. Simply stated, there has been no such hearing. The southern California gas consumer has not had his day in court. We respectfully request and hereby move for an order by this Court setting for hearing the Motion to Affirm filed by Southern California Gas Company and Southern Counties Gas Company of California on December 19, 1968.

Application for Stay of Issuance of Mandate

A Petition for Rehearing will be filed by these Companies on or before the last date for filing a petition for rehearing in this proceeding, which is July 11, 1969. There is no automatic stay applicable thereafter and the normal procedure would be for the proceeding to return to the court below for further proceedings, even though petitions for rehearing are pending before this Court. In the companion motion we have filed for an order by this Court to set our Motion to Affirm for hearing. Should this Court, however, not issue a stay of its mandate, a question might be raised as to whether this Court retained the jurisdiction to set the Motion to Affirm for hearing. This course of events would cause grave and irreparable damage to Southern California Gas Company and Southern Counties Gas Company of California, Intervenor-Appellees herein, and to their gas consumers. For that reason Southern California Gas Company and Southern Counties Gas Company of California pray that this Court issue its order granting this application and staying the

mandate of this Court until this Court has ruled on the motion to set for hearing filed herein.

Respectfully submitted,

SOUTHERN CALIFORNIA
GAS COMPANY

SOUTHERN COUNTIES GAS
COMPANY OF
CALIFORNIA

By JOHN ORMASA
Their Attorney

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SUBJECT INDEX

IN THE

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UTAH PUBLIC SERVICE COMMISSION,

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vs.

EL PASO NATURAL GAS COMPANY, *et al.,*

Appellees.

On Appeal From the United States District Court for the District of Utah.

Motion for Oral Argument on Motion to Affirm by Southern California Gas Company and Southern Counties Gas Company of California.

Southern California Gas Company and Southern Counties Gas Company of California, Intervenors in the case below and Appellees herein, hereby move for oral argument on the Motion to Affirm the judgment of the United States District Court for the District of Utah heretofore filed by said parties on December 19, 1968.

Preliminary Statement.

On December 19, 1968, Southern California Gas Company and Southern Counties Gas Company of California filed their Motion to Affirm the judgment and decree of the United States District Court which designated a purchaser for the Northwest Division System to be divested from El Paso Natural Gas Company. This Motion followed the filing on November 25, 1968, of a Jurisdictional Statement by the Utah Public Service Commission in support of its Notice of Appeal from the District Court's judgment. However, on February 24, 1969, the Utah Public Service Commission served its Motion to Dismiss that appeal pursuant to Rule 60(2) of the Rules of this Court.

In an unconventional action, this Court issued its order on April 21, 1969, wherein it set the Utah Public Service Commission's Motion to Dismiss for hearing, together with a hearing on the motion of William M. Bennett. Following the hearing on this procedural motion the Court issued its opinion of June 16, 1969, wherein the Court (by a 4 to 2 decision) reversed the judgment of the United States District Court and remanded this case for further proceedings.

The Court's action to date has failed to render any disposition of Movants' pending Motion to Affirm the judgment of the United States District Court.

The present Motion for Oral Argument on the Motion to Affirm that judgment is prompted by the urgent

need for relief from this Court's decision of June 16, 1969. The Moving Parties are charged with the responsibility of serving the needs of eleven million gas consumers in Central and Southern California; this Court's recent decision has increased the burden of this responsibility immeasurably, and compels the Moving Parties to seek a full and complete hearing before this Court on the merits of the issues presented in this litigation. Further, recent developments in the gas supply situation to Southern California motivate the Moving Parties to apprise this Court that the consequences of its recent decision may well frustrate the stated goals of this Court in this extended antitrust proceeding.

ARGUMENT.

I.

The Court's Unorthodox Resolution of the Pending Appeal Has Failed to Achieve the Competitive Goals Stated by the Court and Has Met With the Overwhelming Objection of the Majority of Interested Parties.

The significance of this Court's June 16, 1969, decision should be measured against the reception it met from virtually all of the interested parties of record. The following State Utility Commissions have specifically urged this Court to sustain the United States District Court's judgment and/or have petitioned for rehearing or modification of this Court's order:

1. Arizona (Arizona Corporation Commission)
2. California (California Public Utilities Commission)
3. Idaho (Idaho Public Utilities Commission)
4. Nevada (Nevada Public Service Commission)
5. Oregon (Public Utility Commissioner of Oregon)
6. Utah (Utah Public Service Commission)
7. Washington (Washington Utilities and Transportation Commission)
8. Wyoming (Public Service Commission of Wyoming)

Similarly, the following Public Utilities have vigorously opposed the Court's ultimate disposition in this case:

1. Arizona Public Service Company
2. California-Pacific Utilities Company

3. Cascade Natural Gas Corporation
4. Intermountain Gas Company
5. Northwest Natural Gas Company
6. Pacific Gas and Electric Company
7. San Diego Gas & Electric Company
8. Southern California Edison Company
9. Southern California Gas Company
10. Southern Counties Gas Company of California
11. Southwest Gas Corporation
12. Tucson Gas and Electric Company
13. Washington Natural Gas Company
14 Washington Water Power Company

The other important entities which have sought rehearing or modification of this Court's decree include the State of California and the Attorney General of the United States.

To illustrate the weight of these objections, the Moving Parties have set forth as Exhibit A hereto a map of the Western portion of the United States which reflects that every state utility commission in that area affected by this Court's order sought confirmation of the Lower Court's judgment and/or seeks relief from the application of this Court's decree. *These state commissions are charged with the responsibility for preserving the public interest in the regulation of gas utilities on behalf of the more than 29 million persons residing in the combined states.* Further, Exhibit B to this Motion demonstrates that nearly every interested public utility in these states has also manifested its disagreement with the result of this Court's recent decision.

The Court's disposition in this case is all the more unfortunate in light of the difficulties faced by the Trial Court. The trial before Judge Chilson was a vigorous, hotly-contested proceeding in which every facet of the public interest was fully explored and developed. During the litigation, the parties could find no unanimity as to an appropriate disposition of the matter. Judge Chilson strode into this "morass" and ultimately achieved the impossible. While there were disappointed parties who would have preferred a different result, and in fact filed Notices of Appeal to this Court, in the end *every actual litigant* before this Court resolved that the Trial Court's decision could be countenanced. The parties' agreement undoubtedly mirrored their realization that the prospects for the Northwest System's becoming a viable competitor in the California market were being dashed upon the shoals of delay.

As will be discussed below, this Court's recent decision paralyzes the development of the Northwest Division at a critical moment in its history. This Court can easily recognize that the growth of the Northwest Division is inhibited by this Court's action of further suspending the New Company in the processes of this seemingly-endless litigation. Yet, the consistent goal enunciated by this Court in its several decisions in this case is for the divested Northwest Division to become a viable competitor in the burgeoning California gas consumption market. The Court's goal is almost certainly doomed if the Court fails to provide an adequate hearing wherein the parties can argue the merits of this case.

II.

The Prodigious Growth of the Southern California Gas Consumption Market Demands the Institution of a New, Major Gas Supply Project Which Must Be Undertaken With or Without the Participation of New Company.

The continued growth of the Southern California gas consumption market has required the Movants to pursue new and varied methods of achieving the required gas supply. The extent of this growth in gas consumption must be deemed to exceed the most generous anticipation of all of the parties at the inception of this litigation. Indeed, the market has grown beyond the limits of its traditional gas supply sources, and the Movants are now required to seek new and extensive gas resources.

The Northwest Division System would logically desire to participate in a project to provide the needed gas supplies for the Southern California market. The Court has long recognized this candidacy on the part of New Company and has directed its judicial efforts toward achieving this goal.

Yet, the progress of history cannot afford, and will not await, further delays in the birth of New Company. The real demands for new gas supplies are too urgent to withstand the tortuous proceedings which will necessarily be encountered in this continued litigation. In light of the Court's repeated protestations that New Company should become a factor in the gas supply market for California, the Moving Parties feel obliged to apprise this Court that the necessary supply project must proceed with or without the participation of New Company. The Court is undoubtedly aware that if New

Company falters on the threshold of entry into this new gas supply project, its competitive position will be unalterably impaired.

III.
New Developments Since the Court's Decree of June 16, 1969.

As we have heretofore endeavored to point out to this Court there is a gas supply shortage in the traditional sources of gas supply for the Southern California market. It has become clear that the next large increment of gas supply to meet that market will have to come from the North, either Canada or the State of Alaska. In long term, it is hoped that New Company will be able to develop gas supply in the Rocky Mountain area which can compete for the Southern California market. Should New Company desire to participate in the California market, however, its efforts must be directed as quickly as possible to participation in a project from the North. It was in recognition of this reality in today's gas supply picture that the applicant selected by the Trial Court, Colorado Interstate Corporation, entered into negotiations for precisely such a supply and contracted with the Southern California parties. The next gas supply project to serve Southern California will come of necessity from Canada or Alaska, and efforts are currently underway to achieve that result.

A second new development which has occurred since this Court's decision is William M. Bennett's represen-

tation of one of the disappointed applicants, Paradox Production Corporation.

It would be useful to review briefly Mr. Bennett's appraisal of the applicants and his representation of various parties in this case. In the Jurisdictional Statement filed in 1964 on behalf of the State of California by William M. Bennett, Colorado Interstate Gas Company, Paradox Production Corporation, and Pacific Western Pipeline Corporation were referred to as qualified applicants.

On March 24, 1969, William M. Bennett filed a document in this proceeding to have himself appointed by the Court ". . . as Counsel to Represent the Public Interest". In that pleading, William M. Bennett referred to his long association in this proceeding representing the State of California in the following language:

> "Comes now WILLIAM M. BENNETT, an officer of this Court and states as follows:
>
> "Commencing in 1956 and to date Petitioner has been Counsel of record for the State of California in the El Paso monopoly proceedings. . . . Petitioner represted [sic] California in the subsequent divestiture proceedings before the District Court in Salt Lake City and Denver before Judge Chilson. Petitioner represented California in dealings with the United States government imploring and pursuading [sic] it to pursue this litigation sometimes successfully sometimes not. Petitioner as party of record filed a Notice of Appeal from the divestiture decree of Judge Chilson."

During the course of the oral argument on his motion held on April 29, 1969, William M. Bennett referred to the cash sale proposal of Paradox Production Corporation and Pacific Western Pipeline Corporation and urged that only a cash sale would satisfy the mandate of this Court. Six days later, on May 5, 1969, Paradox Production Corporation filed with this Court a document entitled, "Notice of Availability as Purchaser", urging that:

> "Paradox is the only one who has continually and consistently, since its letter of May 22, 1964, maintained that a sale for cash of the assets to be divested is the most expeditious way and the only method by which the mandates of this Court can be adequately carried out."

It is now public knowledge, undenied by William M. Bennett, that he represents Paradox Production Corporation.

The tragedy of the entire situation is that the interests of gas consumers in the Western United States have been confused and emasculated. If the interests of those gas consumers are to be served, it is imperative that this Court grant the pending Motion to Affirm and the related Motion for Oral Argument filed by Southern California Gas Company and by Southern Counties Gas Company of California.

Conclusion.

The overwhelming response to this Court's June 16, 1969, decision, together with the possible frustration of this Court's ultimate goals, prompt Southern California Gas Company and Southern Counties Gas Com-

pany of California to move this Court for oral argument upon the pending Motion to Affirm the judgment and decree of the United States District Court.

Respectfully submitted,

SOUTHERN CALIFORNIA GAS COMPANY,
SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,

By JOHN ORMASA,
Their Attorney.

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Attorneys for Southern California Gas Company,
Southern Counties Gas Company of California.

The State Commissions which urged the U.S. Supreme Court to affirm the U.S. District Court judgment and/or petitioned for rehearing or modification of the U.S. Supreme Court decree, represent a population of 29,110,000.[1]

(1) U.S. Department of Commerce 7-1-60 Provisional Estimates

EXHIBIT A

The plan's commissioners would [illegible] that [illegible] Court's affirm-
ance [illegible] District Court [illegible] Board [illegible] attaining [illegible]
[illegible] right [illegible] consent [illegible]
[illegible]

The distributing utilities which urged the U.S. Supreme Court to affirm the U.S. District Court judgment and/or petitioned for rehearing or modification of the U.S. Supreme Court decree, represent 95% of the gas utility customers in those states whose Commissions are represented on EXHIBIT A.

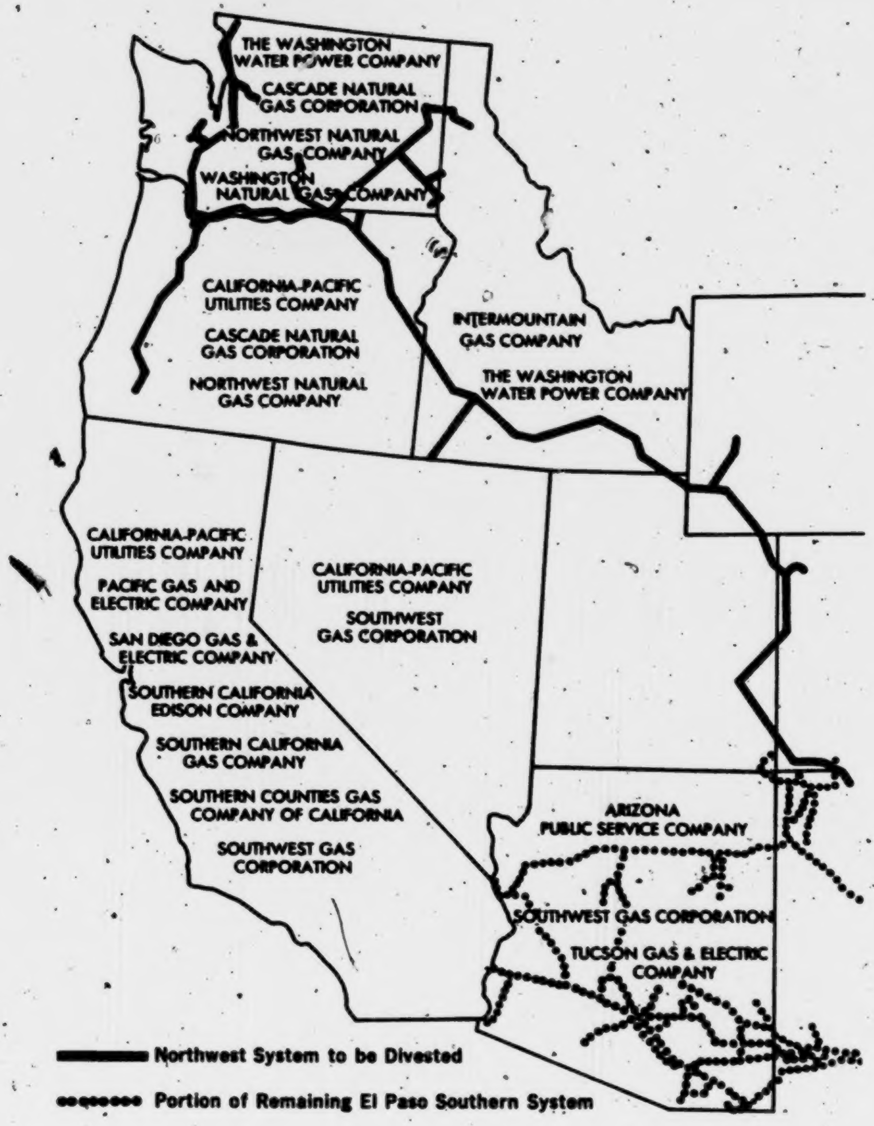

EXHIBIT B

SUPREME COURT OF THE UNITED STATES

No. 776.—OCTOBER TERM, 1968.

Utah Public Service Commission, Appellant, *v.* El Paso Natural Gas Company et al.	On Appeal From the United States District Court for the District of Utah.

[June 16, 1969.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This is before us on appellant's motion to dismiss its appeal under Rule 60. Ordinarily parties may by consensus agree to dismissal of any appeal pending before this Court.[1] However, there is an exception where the dismissal implicates a mandate we have entered in a cause.[2] Our mandate is involved here. We therefore ordered oral argument at which all parties concerned were afforded an opportunity to be heard on the question whether there had been compliance with the mandate. — U. S. —. At the oral argument a number of appellees supported appellants motion. They included the United States,

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[1] Rule 60 (1) provides:
"Whenever the parties thereto shall, by their attorneys of record, file with the clerk an agreement in writing that an appeal, petition for or writ of certiorari, or motion for leave to file or petition for or extraordinary writ be dismissed, specifying the terms as respects costs, and shall pay to the clerk any fees that may be due him, the clerk shall, without further reference to the court, enter an order of dismissal."

[2] It was said by counsel for eight appellees at oral argument: ". . . we do not question this Court's authority to re-examine its mandate and compliance with it. We do urge, however, that your review be confined to the question whether the mandate has been carried out on the record before the court."

the State of California, El Paso Natural Gas Company, Cascade Natural Gas Corporation, Intermountain Gas Company, Northwest Natural Gas Company, the Washington Water Power Company, Washington Natural Gas Company, Idaho Public Utilities Commission, Public Utility Commissioner of Oregon, Washington Utilities and Transportation Commission, Colorado Interstate Corporation, Southern California Gas Company, and Southern Counties Gas Company of California. The motion was opposed by John J. Flynn and I. Daniel Stewart, by brief *amicus curiae,* and by William M. Bennett, who appeared for the State of California when the case was last here, 386 U. S. 129, 131 (1967), and now presents himself, and argued orally, as "consumer spokesman."

This is a Clayton Act § 7 case in which the acquisition of the stock and assets of Pacific Northwest Pipeline Corporation by El Paso Natural Gas Company raised the "ultimate issue" whether "the acquisition lessened competition in the sale of natural gas in California." 376 U. S. 651, 652. We ordered divestiture "without delay." *Id.,* at 662. That was in 1964. The United States later agreed to settle the case. As to that we said:

> "We do not question the authority of the Attorney General to settle suits after, as well as before, they reach here. The Department of Justice, however, by stipulation or otherwise has no authority to circumscribe the power of the courts to see that our mandate is carried out. No one, except this Court, has authority to alter or modify our mandate. *United States* v. *du Pont & Co.,* 366 U. S. 316, 325. Our direction was that the District Court provide for 'divestiture without delay.' That mandate in the context of the opinion plainly meant that Pacific Northwest or a new company be at once restored to a position where it could compete with El Paso in the California market." 386 U. S., at 136.

We set aside that consent decree and remanded for additional findings and a new solution, saying:

> "In the present case protection of California interests in a competitive system was at the heart of our mandate directing divestiture. For it was the absorption of Pacific Northwest by El Paso that stifled that competition and disadvantaged the California interests. It was indeed their interests, as part of the public interest in a competitive system, that our mandate was designed to protect." *Id.*, at 135.

On remand the District Court decided it should choose from among the various applicants the one that is "best qualified to make New Company a serious competitor" in the California market. That court chose Colorado Interstate Corp., the only gas pipeline operator among the various applicants.

Under the plan approved by the District Court, El Paso receives 5,000,000 shares of New Company nonvoting preferred stock, convertible into common stock at the end of five years. What the conversion ratio will be is not known; but, it is said, there will be provisions to restrict El Paso control over the New Company. The New Company also assumes approximately $170,000,000 of El Paso's system-wide bond and debenture indebtedness, an amount designated the Northwest Division's pro-rata share of that indebtedness.

Utah's jurisdictional statement, which she now moves to dismiss, was filed here November 25, 1968. That jurisdictional statement presents the question whether the decree entered below satisfies our mandate. It is the filing of that jurisdictional statement that brings the question here. See *United States* v. *du Pont & Co.*, 366 U. S. 316. In fact, in its jurisdictional statement, Utah

urged that the decree does not meet the requirements of *du Pont*. We thus need not decide whether the papers filed by *amicus curiae* or Mr. Bennett properly presented the question of compliance. We find that the decree of the District Court does not comply with our mandate: it does not apportion the gas reserves between El Paso and New Company in a manner consistent with the purpose of the mandate, and it does not provide for complete divestiture. We therefore vacate the judgment and remand the case for further proceedings.

I.

When the case was last here we said, "The gas reserves granted the New Company must be no less in relation to existing reserves than Pacific Northwest had when it was independent, and the new gas reserves developed since the merger must be equitably divided between El Paso and the New Company. We are told by the intervenors that El Paso gets the new reserves in the San Juan Basin—which due to their geographical propinquity to California are critical to competition in that market. But the merged company, which discovered them, represented the interests both of El Paso and of Pacific Northwest. We do not know what an equitable division would require. Hearings are necessary, followed by meticulous findings made in light of the competitive requirements to which we have adverted." 386 U. S., at 136–137.

The District Court awarded 21.8% of the San Juan Basin reserves to the New Company saying that was "no less in relation to present existing reserves" than Northwest had when it was independent. The District Court also gave the New Company more than 50% of the net additions to the reserves developed since the merger. Concededly the total reserves of the New Com-

pany will not be sufficient to meet the old Northwest's existing requirements and those of a California project.

This attempt to paralyze competition in the California market started years ago; the Clayton Act suit was filed in 1957. The record up to the entry of the present decree shows, as the District Court found, that delay has strengthened El Paso's position. *First,* the delay has strengthened El Paso's hold on the California market, making it more and more difficult for a new out-of-state supplier to enter. *Second,* an additional out-of-state supplier has entered the California market during this 12-year period, taking what well might have been the place of the old Northwest Company had not its competition been stifled. *Third,* permits for new pipelines from Texas to California are now pending before the Federal Power Commission.

The purpose of our mandate was to restore competition in the California market. An allocation of gas reserves should be made which is "equitable" with that purpose in mind. The position of the New Company must be strengthened and the leverage of El Paso not increased. That is to say, an allocation of gas reserves—particularly those in the San Juan Basin—must be made to rectify, if possible, the manner in which El Paso has used the illegal merger to strengthen its position in the California market. The object of the allocation of gas reserves must be to place New Company in the same relative competitive position *vis-à-vis* El Paso in the California market as that which Pacific Northwest enjoyed immediately prior to the illegal merger.

A reallocation of gas reserves under this standard may permit an applicant other than Colorado Interstate Corporation to acquire New Company and make it a competitive force in California. Thus, the District Court is directed to effect this reallocation of gas reserves, and in

light of the reallocation, to reopen consideration of which applicant should acquire New Company. Such consideration should, of course, include whether an award to a particular applicant will have any anti-competitive effects either in the California market or in other markets.

II.

Our mandate directed complete divestiture. The District Court did not, however, direct complete divestiture. Neither appellants nor any party supporting the dismissal argues that the District Court did so. Rather they argue that the disposition made by the District Court was the best that might be made without complete divestiture. Clearly this does not comply withour mandate. *United States* v. *du Pont & Co.*, 366 U. S. 316, was another § 7 case in which we ordered "complete divestiture." *Id.*, at 328. One plan proposed was a distribution of General Motors shares held by du Pont, most of them to be distributed *pro rata* over a 10-year period to du Pont stockholders; the rest were to be sold gradually over the same 10-year period. *Id.*, at 319–320. Du Pont's alternate plan was to retain all attributes of ownership, passing through to its shareholders the voting rights proportional to their holdings of du Pont shares. We did not approve that plan but directed "complete divestiture." *Id.*, at 334. We said "The very words of § 7 suggest an undoing of the acquisition is a natural remedy. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control." 366 U. S., at 329. We said, that divestiture only of voting rights was not an adequate remedy. What was necessary was dissolution "of the intercorporate community of interest which we find to violate the law." *Id.*, at 331.

The reason advanced for allowing El Paso to take a stock interest in the New Company rather than cash is to reduce its income tax burden. We have emphasized that the pinch on private interests is not relevant to fashioning an antitrust decree, as the public interest is our sole concern. *United States* v. *Du Pont, supra,* 326.

The same reasoning is applicable to the present case. Retention by El Paso and its stockholders of the preferred stock is perpetuation to a degree of the illegal intercorporate community. Assumption of $170,000,000 of El Paso's indebtedness helps keep the two companies in league. The severance of all managerial and all financial connections between El Paso and the New Company must be complete for the decree to satisfy our mandate. Only a cash sale will satisfy the rudiments of complete divestiture.

We vacate the judgment of the District Court and remand the cause for proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE WHITE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 776.—October Term, 1968.

Utah Public Service Commission, Appellant, v. El Paso Natural Gas Company et al.	On Appeal From the United States District Court for the District of Utah.

[June 16, 1969.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, dissenting.

The action taken by the Court today will be dismaying to all who are accustomed to regard this institution as a court of law.

All semblance of judicial procedure has been discarded in the head-strong effort to reach a result that four members of this Court believe desirable. In violation of the Court's rules, the majority asserts the power to dispose of this case according to its own notions, despite the fact that all the parties participating in the lower court proceedings are satisfied that the District Court's decree is in the public interest. The majority seeks to justify this extraordinary step on the ground that District Judge Chilson's painstaking 78-page opinion is in violation of the mandate issued in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U. S. 129 (1967), although (1) we have heard no oral argument directed to this question [1] and (2) we have not ordered the interested parties to file full briefs on this issue. Actually, as will

[1] The Court's opinion incorrectly states that "we ordered oral argument at which all parties concerned were afforded an opportunity to be heard on the question whether there has been compliance with the mandate." *Ante*, at 1. The complete text of the Court's order directing a hearing unequivocally shows that the parties were requested to address themselves only to the motion filed by the

appear, what the Court has done is to substitute, *sua sponte,* a new mandate for its old one. I cannot possibly subscribe to such an abuse of the judicial process.

Moreover, even if the impropriety of the Court's precipitous course is swallowed, it seems to me clear that the District Court's decision in the present case did not violate any prior mandate this Court has entered in this long and complicated litigation.[2] Rather than frustrating *Cascade*'s command that "a new company be at once restored to a position where it could compete with El Paso in the California market," 386 U. S., at 136, Judge Chilson's decree adopted the solution which, so far as one can now tell, most effectively realized the goals of § 7 of the Clayton Act. Indeed, it is not unlikely that as a result of the Court's order today, California's natural gas consumers will never obtain the benefits of competition that this lawsuit was intended to achieve when it was initiated by the Department of Justice in 1957.

State of Utah requesting permission to dismiss its appeal and that the parties were not asked to argue the merits of the appeal:

"The motion of appellant to dismiss the appeal under Rule 60 and the motion of William M. Bennett for a hearing are set for oral argument on April 29, 1969. The Solicitor General is invited to file a brief and present oral argument if he so desires, MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent, believing that the action taken by the Court abuses its own processes. See Rule 60. MR. JUSTICE WHITE, MR. JUSTICE FORTAS, and MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter." — U. S. — (1969).

Pursuant to the Court's order, the parties used their limited time for oral argument in an effort to satisfy the Court that they had acted properly in refusing to take an appeal from the District Court's decision. No party presented any substantial arguments on the merits of this case.

[2] See *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co., supra; United States* v. *El Paso Natural Gas Co.,* 376 U. S. 651 (1964); cf. *California* v. *Federal Power Commission,* 369 U. S. 482 (1962).

I.

In addition to 17 private parties, the States of California, Arizona, Nevada, Utah, and Washington intervened in the proceedings below. The Department of Justice of course represented the interests of the United States as plaintiff, and the Federal Power Commission participated as *amicus curiae*. Only the State of Utah, however, chose to file a Jurisdictional Statement in this Court challenging Judge Chilson's decree. All other parties have signified their belief that the District Court's judgment is satisfactory. The State of Utah now wishes to dismiss its appeal, reasonably suggesting that its interests in the present dispute are peripheral, and that if the State of California and the United States do not believe that the decree will prejudice the interests of California's consumers, Utah considers it inappropriate to contest the matter further.

The majority, however, refuses to permit Utah to dismiss its appeal, despite the command of Rule 60 of the rules of this Court:

> "*Whenever* the parties thereto shall by their attorneys of record file with the clerk an agreement in writing that an appeal, petition for or writ of certiorari, or motion for leave to file or petition for an extraordinary writ be dismissed, specifying the terms as respects costs, and shall pay to the clerk any fees that may be due him, the clerk *shall, without further reference to the court, enter an order of dismissal.*" (Emphasis supplied.)

The language of the rule could not be clearer—the parties to a lawsuit are given the absolute right to dismiss their appeal without judicial scrutiny. Since 1858, the rules of this Court have expressly recognized the existence of this right, see Revised Rules of the Sup. Ct.

of the United States, Rule No. 29 (1858),[3] and I have found no decision in which this right has ever been questioned or limited. Nevertheless, the Court today, without any discussion whatever, ignores the heretofore unquestioned interpretation of the rule and declares that "there is an exception where the dismissal implicates a mandate we have entered in a case." *Ante,* at 1.

In handing down this *ipse dixit,* the Court not only overlooks the teachings of more than a century of judicial practice, but also undermines the basic policies which support Rule 60. The rule is not a mere technicality but is predicated upon the classical view that it is the function of this Court to decide controversies between parties only when they cannot be settled by the litigants in any other way. See *Marbury* v. *Madison,* 1 Cranch 137 (1803). On this view of the judicial process, it is difficult to perceive why the Court should feel constrained to enforce its mandate when the parties have subsequently agreed, in a completely voluntary and bona fide

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[3] Rule 29 provided:

"Whenever the plaintiff and defendant in a writ of error pending in this court or the appellant and appellee in any appeal, shall at any time hereafter, in vacation and out of term time, by their respective attorneys, who are entered as such on the record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms upon which it is to be dismissed as to costs, and also paying to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party which may request it a copy of the agreement filed; but no mandate or other process is to issue without an order by the court."

While this rule by its terms provided for dismissal of cases only during vacation, there is no indication that a different procedure was followed during the Term. Surely there would be little reason to permit automatic dismissal during vacation but forbid it at other times.

Rule 29, with minor amendments, was a part of the Court's rules until July 1, 1954, when it was replaced by the present Rule 60.

way, that a different solution will better accommodate their interests. We have labor enough in deciding those pressing disputes which the parties are unable to resolve; there is no need to "do justice" when no litigant is complaining that a wrong has been committed. Nor will it do to say, as the Court seems to suggest, that antitrust decrees, being affected with a public interest, as they surely are, are always subject to *sua sponte* enforcement by the Court. "Enforcement" of the laws of the United States is the province of the Executive Branch. It is no more a proper function of this Court to thwart the Department of Justice when it decides to terminate an antitrust litigation than it is to order this department of the Executive Branch to commence an antitrust case which some members of this Court may feel should be brought.[4]

Although the Court's decision to police its own mandates *sua sponte* thus offends fundamental conceptions of the judicial process, I do not mean to suggest that this Court lacks the *constitutional* power to act in the way it has done. Cf. *Continental Co.* v. *United States,* 259 U. S. 156, 165–166 (1922). The Court does have a legitimate interest in maintaining the integrity of its mandates within the entire judicial system and it may be argued that the lower courts will not conscientiously effectuate our decisions unless all know that the Court will act when it learns of abuses. Yet, although this argument may be enough to establish the constitution-

[4] It is of course perfectly appropriate for a court to make an independent judgment as to the merits of an antitrust consent decree which the parties submit for approval. See, *e. g., United States* v. *Pan American World Airways, Inc.,* 1959 Trade Cas. 75,138 (D. C. S. D. N. Y.). For in the consent decree context, the parties are requesting affirmative action from the judiciary in order to resolve their dispute, while in the situation we confront, none of the parties are requesting further judicial relief.

ality of a practice in which this Court sits as an investigatory body with a roving commission to travel the length and breadth of this land policing its mandates, Rule 60 indicates that such an extraordinary departure from traditional judicial norms has never been thought necessary to insure the integrity of our mandates. Even during periods of history in which there was a greater risk that lower courts would seek to frustrate our decisions, it has been considered sufficient to rely upon the parties to bring violations of a mandate to our attention either by prosecuting a second appeal or by petitioning for a writ of mandamus.[5]

I see no reason why we should turn our back on such basic traditions at this late date. Moreover, if we are to take such drastic action, surely we should not do so in an *ad hoc* manner, under the pressures of the closing days of the Term. Rather, if we are to change Rule 60, we should do so in an appropriate rule-making proceeding, in which the arguments on both sides of the question may be canvassed with the dispassionate neutrality that is appropriate.

For all of these reasons, I would grant Utah's motion to dismiss its appeal and put an end to this 12-year-old lawsuit.[6]

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[5] See *In re Potts,* 166 U. S. 263 (1897); cf. *In re Stanford Fork & Tool Co.,* 160 U. S. 247 (1895); *Ex parte The Union Steamboat Co.,* 178 U. S. 317 (1900).

[6] The Court does not decide whether the papers opposing Utah's motion to dismiss which were presented by John J. Flynn and I. David Stewart, as *amicus curiae,* and those tendered by William M. Bennett, as "consumer spokesman," may be properly considered at this late stage in the proceedings. Since the Court does not reach this question, I do not believe it appropriate to state my views on the matter; nor have I believed it proper to consider in any way the arguments made by Messrs. Flynn, Stewart, and Bennett.

II.

It is with great hesitation that I turn to consider the Court's decision finding Judge Chilson's decree in violation of *Cascade's* mandate. The case before us is one of enormous complexity. In addition to the plaintiff and defendant, 22 intervenors and nine applicants for the acquisition of the New Company participated in the proceedings below. Judge Chilson heard testimony for more than three months; the record in this case covers more than 14,000 pages, not to mention voluminous exhibits. And yet, we have not received any briefs which even attempt a complete discussion either of the merits of this case or of the question whether our mandate has been followed in a satisfactory way. The Jurisdictional Statement submitted by the State of Utah properly does not suggest that this case is suitable for summary disposition and simply attempts to persuade the Court that the questions presented are substantial. The documents filed in support of Judge Chilson's decision are no more satisfactory. While many of the parties who participated below have tendered motions in support of Utah's request to dismiss its appeal, these papers principally discuss the reasons why each party was satisfied with the result reached below and do not attempt a full-scale analysis of the merits of this extended and complicated controversy. Only the Memorandum submitted by the Solicitor General deals with the substance of the case in any significant way, since it contains the Government's Motion to Affirm which had been prepared as an answer to Utah's Jurisdictional Statement. Yet the Government's 18-page document does not pretend to deal thoroughly with this case's factual intricacies.

Despite the inadequate briefing, however, enough emerges from the record to suggest that far from dis-

obeying *Cascade*'s mandate, Judge Chilson made a decision which may well be the only one which realistically promises to fulfill the purposes of the Clayton Act.

The District Court found that "time is of the essence" if the New Company is to compete successfully in the California market. — F. Supp., at —. Judge Chilson's analysis of the competitive situation existing today powerfully supports his conclusion that the chances of successful entry are becoming more remote with every passing year. The District Court noted that when this lawsuit began in 1957, El Paso was the only out-of-state supplier in the California market; in contrast, two additional strong companies have entered the State in the past decade. Moreover:

> "Although the expanding California market appears to offer opportunities for New Company to enter the market, the recommendation of the Federal Power Commission staff that a 42-inch pipeline should be constructed to California is a matter of grave concern, for according to the evidence before the Court, a 42-inch line would serve all increments to the southern California market for the foreseeable future. The Supreme Court recognized that competition in the California market is limited to future increments, which have not yet been certificated for service. Once an increment has been certificated, it is withdrawn from competition. The recommendations of the Commission's staff for the construction of a 42-inch line have been commended by the FPC examiner in a current proceeding as 'bold and constructive.'
>
> . . . . .
>
> "The Government . . . [in] its brief . . . states: "It is too early to predict the ultimate direction or final outcome of this current FPC proceeding. The opportunity it presents to the new company

> which is to emerge from this law suit is evident. If a full scale 42-inch proceeding gets underway . . . the new company should be equipped to enter as a contender with at least the minimum qualifications for serious consideration." — F. Supp., at —.

The District Court found that the Colorado Interstate Gas Company (CIG) was the only potential purchaser which had a real opportunity to convince the FPC that it should operate the new Texas pipeline that holds the key to successful competition in California. Surely this finding has a substantial basis in fact, since no other prospective purchaser of the New Company has ever operated a pipeline and only one has ever had any connection at all with the oil and gas industry. Nevertheless, the Court today substantially decreases the chances of successful competition by the New Company by requiring years more litigation before the day will come when operations will finally commence. During this lengthy period, existing gas companies will become even more solidly entrenched in the market and the Texas pipeline proceeding may well have progressed to the point where the New Company could not obtain serious consideration from the FPC.

Despite the fact that the Clayton Act may well be the loser, the majority prolongs this lawsuit for two reasons. First, it ~~is~~ said that the District Court violated *Cascade*'s requirement that "[t]he gas reserves granted the New Company must be no less in relation to existing reserves than Pacific Northwest had when it was independent and the new gas reserves developed since the merger must be equitably divided between El Paso and the New Company." 386 U. S., at 136–137. But the Court's own discussion of this question unmistakeably demonstrates that Judge Chilson fully complied with this branch of *Cascade*'s mandate. The Court cannot and does not deny that Judge Chilson granted reserves to

the New Company which are "no less in relation to present existing reserves than Northwest had when it was independent." See *ante*, at 4. The only question that remains is whether the District Court decreed an "equitable" division of gas resources discovered since the merger. The answer to this question also seems quite easy, since the Court does not deny that Judge Chilson granted New Company about 50% of these reserves, which is much more than its proportionate share of the assets.

Although this equal division seems more than equitable to the New Company, the majority fastens on the fact that even with this distribution of resources, the New Company will not be assured of sufficient gas both to meet the anticipated demand of New Company's present customers in the Pacific Northwest and to satisfy the requirements of its potential customers in the California market. This indeed would be a source of concern if it were found that New Company could not practically obtain additional gas resources if it decides to compete in California. But Judge Chilson concluded that just the opposite situation obtains; the District Court found that the New Company "could obtain the reserves necessary to compete in the California market." — F. Supp., at —. The Court, however, ignores this finding completely and does not even attempt to show how, given this fact, New Company's equal share of reserves can in any sense be called "inequitable." Indeed, it is perfectly clear that the Court, under the guise of enforcing its mandate, is really creating a new, and more stringent, standard by which to test this divestiture. But surely this is completely illegitimate in a case where no party has challenged the legality of the District Court's decision, and where, at the most, the issue is the lower court's compliance with our previous mandate.

The Court's second ground for claiming disobedience with *Cascade*'s command is equally untenable. It is said that *Cascade* ordered "complete divestiture" without delay and we are told that no divestiture can be complete unless there is a cash sale. Since the trial court did not order a cash sale, the majority finds that *Cascade*'s mandate has not been obeyed.

There are several things wrong with this line of argument. First, *Cascade* expressly states that a cash sale is *not* required under the standards it sets down:

> "Disposition of all of the stock *with all convenient speed* is necessary and conditions must be imposed to make sure that El Paso interests do not acquire a controlling interest." 386 U. S., at 141.

Since *Cascade* did not require a cash sale it is difficult to see how the present divestiture plan, in which all the common stock of the New Company is transferred to CIG is a *per se* violation of this Court's earlier mandate. Once again, the Court has created a new standard for judging the validity of the District Court's decision instead of limiting itself to a consideration of whether the decree fulfilled *Cascade*'s demand "that El Paso interests do not acquire a controlling interest" in the New Company.

I pass, then, to consider whether the divestiture plan before us violates our mandate in permitting El Paso domination of its competitor. While this standard is a rather vague one, MR. JUSTICE DOUGLAS, speaking for Court in *Cascade*, gave it specific content by explaining why the proposed terms of divestiture then under review were unsatisfactory. This explanation is of the highest importance in determining whether Judge Chilson's decree contravened *Cascade*'s command and it must be considered with care. MR. JUSTICE DOUGLAS began his analysis by noting that the decree had taken some steps to insulate the New Company from El Paso control since

it did bar El Paso officers, directors, and owners of more than one-half of one percent of El Paso stock from buying into New Company at the public offering. The Court, however, found this limitation insufficient because:

> "the decree does not prohibit members of the families of such prohibited purchasers from obtaining New Company stock. Further under the terms of the decree, it would be possible for a group of El Paso stockholders, each with less than one-half of one percent of El Paso stock, to acquire at the initial public offering enough New Company stock substantially to influence or even to dominate the New Company. Or such a group could combine with the families of prohibited purchasers in order to control the New Company. After the exchange or public offering, there is no restriction on the number of New Company shares El Paso shareholders may acquire. Thus, there is a danger that major El Paso stockholders may, subsequent to the exchange or public offering, purchase large blocks of New Company shares and obtain effective control." 386 U. S., at 140–141.

Judge Chilson's decree took steps to remedy each and every defect MR. JUSTICE DOUGLAS noted in *Cascade*. All members of the immediate family of any officer, director, or owner of one-half of one percent of El Paso shares may not convert their nonvoting preference shares into voting common shares at any time. Moreover, any person who acts in concert with any director, officer, or substantial owner of El Paso is included within the ban. In addition, these same individuals are not permitted to obtain control of significant proportions of CIG stock, thereby achieving control over the New Company indirectly. Officers, directors, and their associates are barred from owning more than one-tenth of one percent

of CIG stock during the next 10 years and substantial owners of El Paso may not own more than 5% of the outstanding common stock of CIG.[7]

It may be that, on appeal, even these stringent conditions may not be found to have fully satisfied the purposes of the Clayton Act. A decision of this question would of course require an analysis of the financial structure of El Paso in order to determine whether it was possible for the Company or its owners to evade the conditions imposed upon them. But it is surely impossible to hold on this record that Judge Chilson's decree is a violation of the mandate issued in *Cascade* when the present divestiture plan manifests a conscientious effort to comply with all of the suggestions advanced by the Court in that opinion.[8] Indeed, the majority today does not even attempt to make such a claim. Instead, it ignores the fact that the District Court carefully

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[7] These conditions were approved by the District Court on November 7, 1968, in an order approving the Implementing Documents filed by the appropriate parties pursuant to Judge Chilson's decision naming CIG as the successful applicant. The Implementing Documents are a part of the record in this case.

In addition to the restrictions mentioned in the text, the District Court also forbade El Paso's officers and directors as well as their associates, from owning more than one-tenth of one percent of New Company stock for the next 10 years; moreover, El Paso and its affiliates are forbidden to acquire any New Company or CIG stock at any time in the future. Steps have also been taken to assure that El Paso will have no officers or directors in common with New Company or CIG.

[8] The Court relies heavily on *United States* v. *Du Pont & Co.*, 366 U. S. 316 (1961), to support its claim that *Cascade's* mandate has been breached. But *Du Pont* only holds that the District Court must assure itself that "the intercorporate community of interest which we find to violate the law" must be dissolved by divestiture. 366 U. S., at 331. Nothing in *Du Pont* suggests, let alone holds, that a cash sale is the only way to accomplish this objective. Like *Cascade, Du Pont* established no *per se* rule in this area.

framed conditions to assure the New Company's independence. At no point in its brief opinion does the Court analyze this aspect of Judge Chilson's decree, contenting itself with the cryptic comment that "it is said . . . [that] there will be provisions to restrict El Paso control over the New Company." *Ante,* at 3.

III.

The Court's conclusion that its mandate has been disobeyed is, in short, based upon completely erroneous factual premises born of a superficial acquaintance with this 14,000 page record. This is not surprising since the majority has seen fit to decide this important case without the benefit of significant oral or written argument. And yet it is upon this tenuous basis that the Court has chosen to shatter centuries of judicial tradition in order to reach a decision which does not even promise to further the interests of California's gas consumers. What eventuates today evinces a course of unjudicial action that transcends even that which marked the last appearance of the case in this Court. See the dissenting opinion of STEWART, J., in *Cascade,* 386 U. S. 129, 143.

I respectfully dissent.